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No. 08-579

IN THE

Supreme Court of the United States

CYRIL H. WECHT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After a criminal trial in which the government had a full and fair opportunity to make its case, the jury deliberated and did not reach a guilty verdict on any of 41 counts. The district judge declared a mistrial based on a purported jury deadlock but without complying with any of the mandatory provisions of Federal Rule of Criminal Procedure 26.3 (consulting with counsel and canvassing alternatives to a mistrial). Despite what it called "a highly flawed set of procedures" and this Court's admonition that, in double-jeopardy cases, doubts should be resolved "in favor of the liberty of the citizen," the Third Circuit found "manifest necessity" for the mistrial and held that Petitioner could be retried without offense to the Double Jeopardy Clause.

The questions presented are as follows:

1. Whether in a criminal case the government can meet its "heavy" burden to justify a retrial notwithstanding the Double Jeopardy Clause when the district judge not only *sua sponte* declared a mistrial without complying in any respect with Federal Rule of Criminal Procedure 26.3 but also actually prohibited the defendant from voicing any objections to the discharge of the jury.

2. Whether the Court should revisit *United States v. Perez* – which is cited for the principle that the Double Jeopardy Clause does not bar a retrial when a jury does not unanimously agree on a verdict – and determine that the holding attributed to *Perez* is inconsistent with modern double-jeopardy jurisprudence.

LIST OF PARTIES

Petitioner is Cyril H. Wecht. Respondent is the United States of America.

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Petitioner Cyril H. Wecht respectfully requests that the Court enter a writ of *certiorari* to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The precedential opinion of the Third Circuit (Appendix A) is available at *United States v. Wecht*, 541 F.3d 493 (3d Cir. 2008). The district court's order (Appendix B) was not reported in the Federal Supplement. It is available at 2008 U.S. Dist. LEXIS 34957 (W.D. Pa. April 29, 2008). Dr. Wecht filed a motion to stay the entry of the court of appeals' mandate, and the court of appeals denied the motion by order of September 23, 2008.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The Third Circuit had jurisdiction under the collateral-order doctrine. *See Abney v. United States*, 431 U.S. 651, 659 (1977). The Third Circuit entered its judgment on September 5, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Fifth Amendment of the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any

> person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rule of Criminal Procedure 26.3 provides as follows:

> Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.

STATEMENT OF THE CASE

Factual Background

Petitioner Cyril H. Wecht is a 77-year-old, nationally recognized pathologist and the former coroner of Allegheny County, Pennsylvania.

The government indicted Dr. Wecht on January 20, 2006, and originally accused him in an 84-count indictment of theft of honest services, mail fraud, wire fraud and theft from an organization receiving federal funds. After a significant amount of pretrial activity, the criminal trial began with jury selection on January 10, 2008. The government moved to dismiss 43 counts on the eve of trial, and the district judge dismissed those counts with prejudice after the jury was empanelled. Jury selection concluded on January 23, 2008, and the jurors were sworn that day. The trial began with opening statements on January 28, 2008.

During the next seven weeks, the government called 44 witnesses and offered thousands of pages of exhibits. When the government rested on March 11, 2008, the defense immediately rested as well and called no witnesses of its own.

On March 17, 2008, counsel delivered closing arguments and the district judge instructed the jury. The instructions did not include any direction that the jury could reach a partial verdict. The jury began its deliberations the next day. The trial judge generally permitted the jury to establish the hours of its deliberations and did not require the jury to deliberate on Fridays.

The following week, the jury sent the district judge a note that read as follows: "Out of the 41 counts, if any one or more counts the jury cannot come to unanimous agreement on, does that constitute a hung jury?" The district judge consulted with counsel and, with their consent, sent the following written response to the jury: "The answer to your question is no. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment..."

A week later, on Thursday, April 3, 2008, the jury sent two notes to the district judge. Only the second is relevant for present purposes. The district judge announced the second note to the parties at the close of jury deliberations that week. That note included the following:

> After considering all counts and in a variety of ways, and in reconsideration of all of individual opinions according to the court *[sic]* instructions – we have

> unanimously agree *[sic]* we have reached an impasse & respectfully request direction from the Court. We agree additional deliberation would not be helpful.

The district judge told counsel that he was inclined to poll the jurors individually to confirm that they were "hopelessly deadlocked" and that no further deliberations would lead to a unanimous verdict and, once done, then read to the jury the "standard deadlock jury charge" in Model Instruction 9.05 of the Third Circuit's model criminal jury instructions.[1] Before he took those steps, however, the judge allowed both the government and the defense time to consider the issue.

In response, the government's counsel requested a partial-verdict instruction. Defense counsel expressed the view that a mistrial should be declared if the jury confirmed it was hopelessly deadlocked and that further deliberations would not produce a verdict. The district judge denied both oral requests.

The district judge told counsel he would bring in the jurors, poll them, give them the Instruction-9.05 charge and then send them back to deliberate. The district judge had the jurors return to the courtroom. He polled them individually, and each responded that he or she believed the jury to be hopelessly deadlocked such that additional deliberations would not be helpful. The district judge then read to them from the Third Circuit's Model

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[1] The Third Circuit's model instructions were prepared by a committee of district judges with the advice of an advisory panel. The Third Circuit has not endorsed the model instructions.

Criminal Jury Instruction 9.05 and sent them back to their deliberations.[2]

A short time later, the district judge recessed the matter until the following Monday, April 7, 2008.

On the afternoon of Thursday, April 3, 2008, after formal proceedings recessed, the government filed a motion again requesting that the district judge give the jury a partial-verdict instruction (in essence, restating in writing the motion made orally in court earlier that day).

In a written filing on April 4, 2008, Dr. Wecht objected to the proposed instruction and cross-moved for a mistrial. Later that day, the district judge denied the government's partial-verdict request.

On Monday, April 7, 2008, after the jury resumed deliberations, the district judge denied Dr. Wecht's motion for a mistrial.

The jury deliberated for four hours on Monday, April 7, 2008. Shortly before 9:00 a.m. the next morning, April 8, 2008, the district court clerk summoned counsel to the courtroom with an entry on the court's electronic docket that did not describe the purpose of the court appearance.

When the parties and counsel appeared, the bailiff brought the jurors into the courtroom. The district judge then entered the courtroom, took the bench, and stated as follows:

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[2] The district judge did not and has not since explained why he conducted the April 3, 2008, proceedings in the order in which he did (*i.e.*, consulting with counsel and deciding to send the jury back to deliberate *before* questioning the jurors).

THE COURT: Good morning. Thank you all for gathering pursuant to the notice on the Electronic Case Filing system.

For your and the jury's safety and the preserved good order, I would ask that you follow the following instructions this morning:

Everyone should remain in their seats throughout this proceeding from now until when the jury and I exit the courtroom.

No one will be permitted to be running in and out of the courtroom as happened last week.

Secondly, I expect everyone to be quiet, and if anyone wants to make motions or objections to this proceeding or whatever, they may do so in writing on ECF, as we have done throughout the trial.

If anyone is unwilling to abide by these instructions, I will give you time now to exit.

Thank you for your assistance and cooperation.

The jury has informed the bailiff that they remain hopelessly deadlocked and are unable to reach a unanimous verdict on the defendant's guilt on any of the 41 counts and are unable to reach

a unanimous verdict on the defendant not being guilty of any of the 41 counts.

The jurors' note will be marked as Court Exhibit 13, and I have copies thereof, which you can pick up when we're done with this proceeding, which has deleted the names of presumably the foreperson and secretary.[3]

***

Thus, defendant is still charged with each of the 41 counts with the constitutional presumption of innocence as to each of the 41 counts.

It is the government's responsibility to decide whether or not to retry the defendant.

Does the government have a decision today whether the government will retry the defendant?

[THE GOVERNMENT]: We do, Your Honor, and we will.

THE COURT: I would ask that by Friday at noon that the government file a notice as to which of the counts, which could be as few as one or as many

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3 In its totality, the jury's final note read as follows:

Pursuant to court instructions the jury contends that we have exhausted all further deliberation efforts. We agree unanimously that we are unable to reach a verdict – on all 41 counts and are essentially deadlocked in the case of United States of America vs. Cyril H. Wecht.

as the 41, which of the counts will be tried in the retrial.

Is the government prepared to proceed immediately to retry the case?

[THE GOVERNMENT]: We are, Your Honor.

THE COURT: Is the defense prepared to immediately retry the case?

[DEFENSE COUNSEL]: We will have several motions to make before that happens.

THE COURT: Okay. Just for everyone's scheduling purpose, I will set the trial for May 7th – excuse me – May 27th, which is the day after Memorial Day, May 27, 2008, at nine a.m.

That should give defense and the government sufficient time to file whatever motions they wish to respectively file.

On behalf of the defendant, when would you like to file any motions you wish to file, sir?

[DEFENSE COUNSEL]: I will need some time to think about that. This is quite a surprise.

> THE COURT: Okay. I know everyone needs a little rest, so I appreciate that matter.
>
> I would ask the defense, if you would kindly for me, please file any motions you have by noon on April 18, 2008.
>
> If you find after reflection that date doesn't work for you, then just file an appropriate motion, and I will work with you in that regard.
>
> I will send out a scheduling order as to the May 27th, 2008 date without prejudice to whatever defendant's motions will come before me.
>
> *Before I declare a mistrial and discharge the jury,* I wish to express several things.
>
> First of all, I want to thank our wonderful court reporters . . .

Wecht, 541 F.3d at 497-99 (emphasis added). (Appx A at 7a-11a) The district judge then thanked various court personnel and the jurors. After concluding those remarks, he made the following statement: "I declare a mistrial. I discharge the jury and the alternate jury . . ." Importantly, the jurors were present for the entire proceeding.

As the transcript demonstrates, the district judge began the mistrial proceeding by expressly ordering counsel to remain quiet, to make no motions and to offer no objections.

He told counsel that the jurors had indicated that they were "hopelessly deadlocked" when, in fact, their note said "essentially deadlocked." The district judge also characterized the jurors as having said they could not reach unanimity on "*any* of the 41 counts" (emphasis added) when, in fact, the jurors' note said they could not reach unanimity on "*all* of the 41 counts" (emphasis added).[4] The district judge did not question the jury foreman or any other member of the jury.

The district judge made no effort to consult with counsel about whether a mistrial was appropriate or, for that matter, to seek counsels' consent to a mistrial or counsels' suggestions about whether there might be some alternative to a mistrial. Indeed, as noted, the district judge began the proceeding by ordering all present to remain silent and to offer no motions or objections.

Proceedings Below

On April 14, 2008, Dr. Wecht filed in the district court a motion to dismiss the indictment and preclude the government from further prosecution in violation of the double-jeopardy provisions of the Fifth Amendment.

The district judge denied the motion on April 29, 2008. In his order denying the motion (Appx B), he offered a number of rationales. The

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[4] As noted in the transcript, the district judge only made copies of the jury's final note available to counsel *after* the conclusion of the proceeding in which he declared a mistrial. Thus, counsel could not have known during the proceeding that the note said "essentially deadlocked" rather than "hopelessly deadlocked" or "all of the 41 counts" rather than "any of the 41 counts."

district judge first asserted that, because Dr. Wecht had moved for a mistrial the previous week, he somehow consented to the *sua sponte* entry of a mistrial on April 8, 2008 (even though the district judge had denied Dr. Wecht's motion the day before entering the mistrial order). The district judge further asserted that Dr. Wecht somehow consented to the mistrial because, during the April 8, 2008, proceeding, his counsel did not violate the district judge's express order that there be no motions or objections.

The district judge then asserted that "it cannot be seriously disputed that the jury was hopelessly deadlocked" and that "[t]here can be *no doubt*, on the record before this Court, that over a five day period, this Court fully and faithfully complied with Fed.R.Crim.P.26.3 in letter and in spirit" (emphasis original). (Appx B at 67a)

On April 29, 2008, Dr. Wecht filed his notice of appeal to the Third Circuit. On the same day, he filed a motion in the district court seeking a stay of the retrial pending appeal. The district judge denied the stay, asserting that the appeal was "frivolous," but the court of appeals granted a stay less than a week later.

Dr. Wecht argued on appeal that the district judge's process in declaring the mistrial was so procedurally irregular that the record created by that process could not support a finding of manifest necessity.

Dr. Wecht first argued that the district judge's failure to comply with the mandates of Rule 26.3 was fatal to the mistrial declaration – and hence precluded any attempt to retry Dr. Wecht.

Dr. Wecht additionally argued that, in addition to the Rule 26.3 violation, there were other significant errors in the mistrial process that mandated dismissal of the indictment on double-jeopardy grounds.

For example, the jury's final note referred to the panel as having been "essentially" deadlocked, a phrasing that should have engendered questions of the jurors about whether their perceived deadlock was hopeless or momentary. Similarly, the fact that the jurors wrote in their final note that they could not reach unanimity "on all 41 counts" should have prompted a question to the jury to determine if it understood its authority to render a partial verdict. The district judge asked none of those questions. He did not show the note to counsel and he did not consult with counsel about their positions on a mistrial or the availability of any alternatives to a mistrial. He did not seek, or obtain, Dr. Wecht's consent to a mistrial declaration, and he did not offer Dr. Wecht any opportunity to suggest alternatives. Thus, although this Court has held that the government bears a "heavy" burden to justify a mistrial, the record created in the district court was so scant that the government could not meet its burden.

The court of appeals (Judges Smith, Fisher and VanAntwerpen) held oral argument on August 4, 2008. At the argument, counsel for the government expressly waived any argument that Dr. Wecht consented to the mistrial. Thus, the sole issue for the Third Circuit was whether there was "manifest necessity" for the mistrial when, on the day of the *sua sponte* mistrial declaration, the district judge complied with absolutely none of the mandatory requirements of Rule 26.3.

The Third Circuit delivered its decision on September 5, 2008. The court divided its opinion into an examination of the "ideal" procedure for a district judge to employ before declaring a mistrial and then an examination of what the district judge did in this case (a section the court of appeals labeled "The Violation"). The Third Circuit's opinion included the following determinations:

- "[T]he District Court did not come close to following [Federal Rule of Criminal Procedure] 26.3 at the April 8, 2008 proceeding. First, it did not show or read to counsel verbatim the second jury note until after mistrial was already declared. Second, it explicitly instructed counsel 'to be quiet, and if anyone wants to make motions or objections to this proceeding or whatever, they may do so in writing on ECF, as we have done throughout the trial.' Third, it announced the new development and its corresponding intentions in the jury's presence. At no time during that proceeding did the District Court solicit counsel's views as to the propriety of the impending mistrial declaration. The lack of information to counsel rendered difficult their ability to make an informed decision; the effective gag order rendered difficult any attempt by counsel to urge the District Court to follow Rule 26.3 at that time; and the fact that this all occurred in the jury's presence rendered difficult the ability of defense counsel to object or even ask for a sidebar, for fear that the jury would blame the defense for prolonging its term of service." *Wecht*, 541 F.3d at 503. (Appx A at 21a-22a)

- The district judge "did not question the foreperson, poll the jurors individually, or 'hold a hearing with counsel and the defendant' outside the presence of the jury." 541 F.3d at 501-02. (Appx A at 18a)

- The district judge "did not make an explicit finding of manifest necessity under the seven factors listed in the third step of Comment 9.06, prior to calling the jurors back into the courtroom and discharging them." 541 F.3d at 502. (Appx A at 19a)[5]

Having concluded that the district judge engaged in "a highly flawed set of procedures," 541 F.3d at 511 (Appx A at 39a), the court of appeals then considered what remedy – if any – it would provide.

The Third Circuit first held that, while the requirements of Rule 26.3 are mandatory, "a violation of Rule 26.3 does not always mean that a mistrial was declared improperly as a matter of constitutional law, and accordingly hold that the remedy for a violation of Rule 26.3 is not automatically the dismissal of the indictment." 541 F.3d at 504. (Appx A at 24a) The Third Circuit's holding in this regard followed the Eleventh Circuit's

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[5] The third step to which the court of appeals referred requires the district court to consider the following seven factors: (1) a timely objection by the defendant; (2) the jury's collective opinion that it cannot agree; (3) the length of jury deliberations; (4) the length of trial; (5) the complexity of the issues presented to the jury; (6) any proper communications between the judge and jury; and (7) the effects of exhaustion and the impact of coercion of further deliberations on the jury. *See* Third Circuit Model Criminal Jury Instruction 9.06 (available on the Third Circuit's web site at www.ca3.uscourts.gov).

holding in *United States v. Berroa*, 374 F.3d 1053 (11th Cir. 2004) (*cert. denied*, 543 U.S. 1076 (2005)).

In essence, the Third Circuit in this case followed the Eleventh Circuit's approach in *Berroa:* it held that the Rule-26.3 violation lessened the deference given to the district judge's determination of manifest necessity, but that the court of appeals could itself review the record to determine if there was manifest necessity for the mistrial.[6]

Here, the Third Circuit gave greatest weight to the issue of "the jury's collective opinion that it cannot agree." *Wecht*, 541 F.3d at 509. (Appx A at 34a) The court of appeals focused on the two notes from the jury – the first from April 3 and the second from April 7. The court held that it would be "counterintuitive" to read the April 7 note (referring to the jury being "essentially deadlocked") as calling into question the hopelessness of the jury's purported deadlock. 541 F.3d at 509. (Appx A at 35a) Similarly, in response to the ambiguity in the jury's note regarding its inability to reach a unanimous verdict "on all 41 counts," the court of appeals held that "[w]e believe the likelihood of this understanding is low." *Id.* In doing so, the court of appeals erroneously stated that the trial judge had given a partial verdict instruction, citing to the original charge to the jury following closing argument.[7] 541 F.3d at 509. (Appx A at 35a-36a)

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[6] The Third Circuit's opinion in this case and the Eleventh Circuit's opinion in *Berroa* share another common point: it is essentially impossible to discern from either opinion what standard of review the appeals courts ultimately employed.

[7] No partial verdict instruction was ever given the jury—not in the original instruction and not in response to any notes sent out by the jury. As noted, the trial judge refused to do so

The court of appeals then noted that the jury deliberated for 54.5 hours over 10 days after a 23-day trial and concluded that "the amount of deliberation time corresponded sufficiently to the length and complexity of the trial..." 541 F.3d at 509-10 (Appx A at 36a-37a) Finally, the appeals court held that the record of communications between the district judge and the jury – including the April 3 polling that the court of appeals held did not satisfy Rule 26.3 – supported a finding of manifest necessity. 541 F.3d at 510. (Appx A at 37a)

Accordingly, the Third Circuit held that there was manifest necessity and it affirmed the denial of Dr. Wecht's motion to dismiss the indictment and preclude further prosecution.

The court of appeals concluded its opinion, however, by exercising its supervisory powers to remove the trial judge from further duties on the case in order that any further proceedings would be presided over by a "less invested adjudicator."[8] 541 F.3d at 511-12. (Appx A at 39a-40a)[9]

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twice prior to the day the mistrial was granted and did not seek the parties' view on whether such an instruction was proper in light of the note sent out the day the mistrial was declared.

[8] The Third Circuit also noted the unusual nature of the trial judge's procedures throughout the case, some of which were noted in a prior opinion of the Third Circuit denying a pretrial motion to have the trial judge recused. Among other things, those procedures included the *en masse* admission of hundreds of thousands of pages of government exhibits long before trial in an evidentiary vacuum. *See United States v. Wecht*, 484 194, 217 (3d Cir. 2007)

[9] Dr. Wecht filed a motion asking the Third Circuit to stay the issuance of its mandate pending a petition to this Court for a writ of *certiorari*. The court of appeals denied the motion on September 23, 2008. The mandate issued on October 27, 2008.

As of the date on which this petition is being filed, the district court has not scheduled a retrial.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' JUDGMENT IS INCONSISTENT WITH THIS COURT'S JURISPRUDENCE IN HOLDING THAT A MISTRIAL MAY BE SUPPORTED BY MANIFEST NECESSITY WHEN THE DISTRICT JUDGE FAILED TO COMPLY IN ANY RESPECT WITH FED. R. CRIM. P. 26.3.

The Court has on a number of occasions held that a mistrial must be accompanied by "manifest necessity" for there to be a retrial that does not offend the Double Jeopardy Clause.[10] The Court has emphasized that the government bears a "heavy" burden to prove that there was manifest necessity and that close cases are to be resolved in favor of the liberty of the defendant.[11]

In its modern double-jeopardy jurisprudence, the Court has described the important values underlying the constitutional right. In *Green v. United States*, the Court described the first of these policies:

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[10] *See, e.g., Arizona v. Washington*, 434 U.S. 497 (1978). While Dr. Wecht argues in the next section of this petition that the "manifest necessity" standard utilized in double-jeopardy jurisprudence arises from an ancient precedent that did not in fact address any constitutional provision, for purposes of this section of his petition, Dr. Wecht assumes as binding extant double-jeopardy jurisprudence.

[11] *See Arizona v. Washington*, *supra* (heavy burden), and *Downum v. United States*, 372 U.S. 734, 737 (1963) (close cases to be resolved in defendant's favor).

> The underlying idea, one that is deeply engrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting [the defendant] to embarrassment, expense and ordeal and compelling [the defendant] to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent [the defendant] may be found guilty.

355 U.S. 184, 187-88 (1957). In *United States v. Jorn*, the Court described a second, and equally important, value embedded in the guarantee that no person shall "be subject for the same offense to be twice put in jeopardy . . .", specifically a defendant's right to have his trial completed by the particular tribunal that has heard the government's evidence against him.

> If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial...In the absence of [a defense motion for a mistrial], the *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial

> discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.

400 U.S. 470, 485 (1971). In *Arizona v. Washington*, the Court reinforced the point:

> Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's "valued right to have [the] trial completed by a particular tribunal."... Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

434 U.S. 497, 503-05 (1978) (quotation omitted).[12]

Thus, the Court's modern double-jeopardy jurisprudence recognizes two constitutional principles for the benefit of those the government targets for prosecution: recognition that the general rule is that the prosecutor generally gets "one, and only one" opportunity to prove his case and the defendant's associated right to have a trial completed by one tribunal. The prosecutor does not get a second chance, and the defendant does not lose his right to have his trial completed by the chosen jury unless the trial judge scrupulously exercises his discretion

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[12] In *Arizona v. Washington*, which was not a case involving a deadlocked jury, the Court explained that the "valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." 434 U.S. at 505.

and then concludes that the ends of public justice are not served by continuing the proceedings.

These core principles of modern double-jeopardy jurisprudence are embodied in the mandatory provisions of Federal Rule of Criminal Procedure 26.3, enacted in 1993, and in a variety of procedural protections implemented by the courts of appeals.

Rule 26.3 mandates as follows: "Before ordering a mistrial, the court *must* give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives" (emphasis added). The advisory committee notes accompanying the rule elaborate on the point.

> Rule 26.3 is a new rule designed to reduce the possibility of an erroneously ordered mistrial which could produce adverse and irretrievable consequences. The Rule is not designed to change the substantive law governing mistrials. Instead it is directed at providing both sides an opportunity to place on the record their views about the proposed mistrial order. In particular, the court must give each side an opportunity to state whether it objects or consents to the order.
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> ***
>
> The Rule ensures that a defendant has the opportunity to dissuade a judge from declaring a mistrial in a case where granting one would not be an abuse of discretion, but the defendant believes

> that the prospects for a favorable outcome before that particular court, or jury, are greater than they might be upon retrial.

1993 Advisory Committee Note to Fed. R. Crim. P. 26.3. Put another way, the rule mandates that the district judge exercise scrupulous care before discharging the defendant's chosen jury and the allowing the prosecution yet another opportunity before a different jury. To ensure that scrupulous care, Rule 26.3 demands that the trial judge give counsel an opportunity to protect the constitutional rights of the accused and the values noted by this Court. Indeed, the rule recognizes that, even when the district judge might be within his discretion to order a mistrial, counsel must be given the opportunity to argue against that exercise of discretion.

The courts of appeals have added additional steps to those commanded by Rule 26.3 when the proposed mistrial is in response to a potentially deadlocked jury, all of which are aimed at ensuring the scrupulous care required of the trial judge to protect, not defeat, those core constitutional values. For example, the federal appellate courts call upon district judges to question the jurors about the state of their deliberations and the likelihood that a present deadlock is "hopeless." *See, e.g., United States v. Razmilovic*, 507 F.3d 130, 138-39 (2d Cir. 2007).

This Court has not yet addressed the consequence of a complete failure to follow the non-discretionary procedures of Rule 26.3, an issue of considerable import given its constitutional underpinnings. Moreover, despite the clear and

mandatory procedures embodied in Rule 26.3, there is a troubling number of cases in which district judges have simply not abided by its command and thereby caused interlocutory appeals prior to any purported retrial.[13] There is simply no legitimate reason for trial judges to be ignoring the mandatory language of a rule with decidedly constitutional overtones expressly directed only at them, and conversely there is ample reason for this Court to act in its supervisory power to correct such practices given the harm to both the accused and the systemic concerns raised by ignoring such a clear rule. The Court should conclude that a mistrial declared without any compliance with Rule 26.3 cannot be said to have been supported by manifest necessity, particularly when the defendant is not given the opportunity to object to the discharge of the tribunal and certainly when his counsel is affirmatively told he cannot register any objection.

Both the Third Circuit in this case and the Eleventh Circuit in *Berroa* erred in concluding that Rule 26.3 does not embody a constitutional protection such that its studied violation negates any finding of manifest necessity. This Court has suggested otherwise. For example, in *United States v. Jorn*, 400 U.S. 470 (1971), the court found that

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[13] In just the past four years, the Third Circuit has addressed four cases in which district judges failed to comply with Rule 26.3's mandatory procedures. *See Wecht*, 541 F.3d 493; *United States v. Allick*, 274 Fed. Appx. 128 (3d Cir. 2008); *United States v. Medina*, 175 Fed. Appx. 541 (3d Cir. 2006), and *United States v. Rivera*, 384 F.3d 49 (3d Cir. 2004). The problem arises with frequency in other circuits as well. *See, e.g., United States v. Berroa*, 374 F.3d 1053 (11th Cir. 2004); *United States v. Felton*, 262 Fed. Appx. 195 (11th Cir. 2008); *see generally, United States v. Razmilovic*, 507 F.3d 130 (2d Cir. 2007) (not expressly referring to Rule 26.3 but describing a failure to comply with the rule's requirements).

double-jeopardy precluded a mistrial in part because the district judge refused to hear from counsel. 400 U.S. at 487. The trial judge's failure to consider alternatives to a mistrial was similarly a factor in the Court's decision in *Jorn*. *Id.* In *Arizona v. Washington*, on the other hand, the Court found that

> The trial judge did not act precipitately in response to the prosecutor's request for a mistrial. On the contrary, evincing a concern for the possible double jeopardy consequences of an erroneous ruling, he gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial. We are therefore persuaded by the record that the trial judge acted responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding.

434 U.S. at 515-16. The Court has found that the trial judge's conferral with counsel is a critical element in determining whether the defendant's constitutional right to have his trial conclude before a single tribunal has been appropriately protected by the requisite scrupulous care.[14]

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[14] In *Berroa*, the Eleventh Circuit supported its conclusion that Rule 26.3 does not itself have constitutional underpinnings by referring to the advisory committee note that indicates that the rule was not intended to do anything but codify existing principles. The Eleventh Circuit's analysis stopped there and erred in doing so because those existing principles are squarely rooted in the constitutional values established by this Court.

There is another reason Rule 26.3's mandate that the district judge confer with counsel should be understood to implement a constitutional requirement. As the advisory committee notes indicate, "[t]he Rule ensures that a defendant has the opportunity to dissuade a judge from declaring a mistrial in a case where granting one would not be an abuse of discretion, but the defendant believes that the prospects for a favorable outcome before that particular court, or jury, are greater than they might be upon retrial." Thus, the consultation requirement serves two purposes: it allows the defense to argue that that a mistrial is not manifestly necessary in that, for example, there are alternatives to a mistrial; and it allows the defense to argue that, even if the judge would be acting within his discretion in declaring a mistrial, he still should not do so for whatever reasons the defense might offer.

The federal district courts and courts of appeals must frequently consider whether there is or was manifest necessity for a mistrial in light of a purported jury deadlock.[15] They are, at present, without guidance from this Court about whether a material deviation from Rule 26.3 compels the conclusion that a mistrial was not supported by manifest necessity. Two courts of appeals have now held that Rule 26.3, although phrased in mandatory language, is essentially aspirational and that

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[15] *See, e.g., United States v. Charlton*, 502 F.3d 1 (1st Cir. 2007); *United States v. Altieri*, 278 Fed.Appx. 53 (2d Cir. 2008); *United States v. Keene*, 287 F.3d 229 (1st Cir. 2002); *Razmilovic*, 507 F.3d 130 (2d Cir. 2007); *Wecht*, 541 F.3d 493 (3d Cir. 2008); *United States v. Mark*, No. 08-1177, 2008 WL 2673869 (3d Cir. July 9, 2008); *Allick*, 274 Fed.Appx. 128 (3d Cir. 2008); *Berroa*, 374 F.3d 1053 (11th Cir. 2004); *United States v. Vaiseta*, 333 F.3d 815, 818 (7th Cir. 2003); and *United States v. Sybal*, 468 F. Supp.2d 219 (D. Me 2007).

compliance with its requirements is only one factor to be considered on appeal.

This case presents a particularly appropriate vehicle for the Court to examine the first issue presented in the petition. The Third Circuit correctly held that the district judge failed entirely to meet the requirements of Rule 26.3. Here, the district judge did not merely fail to seek counsel's position; he expressly muzzled counsel by declaring at the beginning of the mistrial proceeding that counsel could not speak, offer motions or assert objections. Similarly, the district judge did not consider or consult with counsel about any alternatives to a mistrial.[16] Instead, the trial judge first confirmed that the government would immediately retry Dr. Wecht – and did so in the presence of the jury *before* he declared a mistrial. Still, the Third Circuit purported to find manifest necessity based on its own review of the scant record, and it held that Rule-26.3 compliance was just one among many factors. Thus, this case cleanly presents the first legal issue Dr. Wecht asks the Court to review.

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[16] Dr. Wecht asserted before the Third Circuit that one alternative the district judge should have considered on the day in question was to offer a partial-verdict instruction. The phrasing of the final jury note clearly suggested clearly that the jury may have believed it had to reach a verdict on *all* counts. Had the district judge given such a charge, the jury might well have returned verdicts on at least some of the 41 counts of the indictment such that Dr. Wecht would not face retrial on all of them. The Third Circuit's response to that point was to assert, incorrectly, that the district judge in fact offered a partial jury instruction. *See Wecht*, 541 F.3d at 509. (Appx A at 35a-36a) The appeals court's statement was factually inaccurate. The Third Circuit's model criminal jury instructions include a partial-verdict instruction. As noted, the district judge never delivered it or any instruction with a similar meaning.

II. THIS COURT SHOULD CLARIFY AND MAKE CONSISTENT ITS DOUBLE JEOPARDY JURISPRUDENCE BY HOLDING THAT, WHERE A JURY REACHES A DEADLOCK AFTER THE GOVERNMENT HAS HAD A FULL AND FAIR OPPORTUNITY TO PRESENT ITS CASE, JEOPARDY TERMINATES AND THERE CAN BE NO RETRIAL.

In *United States v. Perez,* 22 U.S. (9 Wheat) 579 (1824), the Court held that a defendant in a capital offense case could be retried following the discharge of the original jury without the consent of the accused. The Court held as follows:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.

22 U.S. (9 Wheat) at 580. In the 184 years since *Perez,* a decision less than a page in length and with no legal citations, the Court has relied on it for two points of law: (1) that there must be "manifest necessity" for a mistrial in a criminal case in order for there to be a retrial and (2) that a genuinely deadlocked jury presents a circumstance of manifest necessity allowing a retrial. Indeed, the Court has repeatedly recited the second point with no analysis of its correctness but only a citation to *Perez.* Moreover, although *Perez* never referred to the Double Jeopardy Clause, the Court's subsequent

opinions have treated it as though it had. Consider the following examples:

- In *Logan v. United States*, 144 U.S. 263 (1892), another complex murder case, the Court rejected a claim of multiple jeopardy, slightly rephrasing *Perez* as holding that "whether the discharge of the jury was manifestly necessary in order to prevent a defeat of the ends of public justice, was a question to be finally decided by the presiding judge in the sound exercise of his discretion." *Id.* at 297.

- In *Dreyer* v. *Illinois*, 187 U.S. 71 (1902), the Court again was content to rely on *Perez*, stating that *Perez* had been reaffirmed in *Logan* and other cases decided by the Court since *Perez*.

- In *Keerl* v. *Montana*, 213 U.S. 135 (1909), the Court allowed a retrial after a purportedly hung jury and erroneously asserted that, in *Perez*, Court "passed upon the question arising under the Fifth Amendment").

- In *Wade v. Hunter*, the Court explained that "[t]he rule announced in the *Perez* case has been the basis for all later decisions of this Court on double jeopardy" 336 U.S. 684, 690 (1949). The Court in *Wade* further expressed the view that precluding a second trial following the failure of the jury to reach a verdict would frequently frustrate the purpose of the law to protect society from those guilty of crimes. Somewhat inconsistently, the Court in *Wade* also recognized for the first time that

the defendant had a valued right to have his trial completed by a particular tribunal and that such a right was an element of the Double Jeopardy Clause.

- In *Arizona v. Washington*, the Court wrote in *dictum* that one example of manifest necessity is a "mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial." 434 U.S. at 509.

- In *Richardson v. United States*, 468 U.S. 317, 323 (1984), the Court again pointed to *Perez* for the rule that a failure of the jury to agree on a verdict was an instance "of manifest necessity" which permitted a trial judge to terminate the first trial and retry the defendant, because the "ends of public justice would otherwise be defeated."

Simply put, the Court early on read *Perez* to hold that a retrial after a genuinely deadlocked jury does not offend the Double Jeopardy Clause even though the policies of that constitutional provision had not been fully articulated at the time of *Perez*.

There is a significant historic inaccuracy in the Court's repeated references to *Perez* and ample reason for this Court to examine the continued viability of relying on *Perez* to permit serial trials when the government fails to convince a jury of guilt.

First, *Perez* was not a double-jeopardy case. Its text includes no references to the Double Jeopardy Clause, the Fifth Amendment or even the Constitution. As Justice Powell wrote in dissent in *Crist v. Bretz*, 437 U.S. 28 (1978), *Perez* dealt with a

then-accepted common-law rule of jury practice that a jury, once sworn, could not be discharged. 437 U.S. at 44 (Powell, J., dissenting).

There is a second, and related, reason to conclude that *Perez* did not address the Double Jeopardy Clause. At the time the Court decided *Perez*, American law followed British common law, which held that jeopardy only attached when the jury rendered a verdict. *See Crist*, 437 U.S. at 29-30. However, more than a century after *Perez*, the Court held that, for purposes of the Double Jeopardy Clause, jeopardy attaches when the jury is sworn at the outset of the trial. *See Downum*, 372 U.S. 734.

That change and the articulated policies behind that change are critical. *Perez* was a deadlocked-jury case. Given the then-current understanding that jeopardy only attached when there was a verdict, if the Court were considering *Perez* in the context of the Double Jeopardy Clause, it would have had no reason to set out its "manifest necessity" standard. It would simply have held that jeopardy never attached. The "manifest necessity" formulation dealt not with double jeopardy but with the common-law rule against discharging a jury before it reached its verdict.

The majority in *Crist* conceded the possibility that *Perez* had been misconstrued. 437 U.S. at 34 n.10 ("In fact, a close reading of the short opinion in that case could support the view that the Court was not purporting to decide a constitutional question, but simply settling a problem arising in the administration of federal criminal justice. But to cast such a new light on *Perez* at this late date would be of academic interest.").

The issue should raise far more than "academic interest." The historic misunderstanding of *Perez* has created an obvious and irreconcilable inconsistency in the Court's double-jeopardy jurisprudence.

The Court's modern double-jeopardy jurisprudence rests on three principles: a defendant has a constitutional right not to be placed in jeopardy more than once and a constitutional right to have his trial completed before the tribunal that first began to hear the evidence, and the government has an interest in having one, full opportunity to convince a jury to convict.

In *Arizona v. Washington*, the Court described the rationales underlying the Double Jeopardy Clause:

> Because jeopardy attached before the judgment becomes final, the constitutional protection also embraces the defendant's "valued right to have his trial completed by a particular tribunal." The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is

> aborted before it is completed. *Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.*

434 U.S. at 503-4 (emphasis added) (*quoting Jorn*, 400 U.S. at 484).

As noted, in *Wade*, the Court for the first time held that a criminal defendant has a constitutional right to have his trial completed before a particular tribunal. 336 U.S. at 689. In *United States v. Green*, 355 U.S. 184 (1957), the Court amplified the policies underlying the right to have the trial completed by a particular tribunal announced in *Wade* and held that "[t]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Id.* at 187-88.

In *Crist*, the Court held that the defendant's right to have his trial completed by a particular tribunal and to avoid the ordeal of a second trial lies at the heart of the constitutional rule that jeopardy attaches when a jury is empanelled and sworn. 437 U.S. at 35-36.

For the most part, the Court's recent cases harmonize these three principles.

Consider *Illinois v. Somerville*, 410 U.S. 458 (1973). The Court reviewed an Illinois case in which a jury was sworn but, before it heard any testimony,

the prosecutor recognized a fatal defect in the indictment. The trial judge aborted the trial, the prosecution obtained a new, correct indictment and the defendant was convicted in a second trial. This Court considered whether the second trial violated the Double Jeopardy Clause, and it concluded that it did not. At least in the context of recognizing that the government should have one clear opportunity that was a rational result. The prosecution did not have a full chance to require the defendant to stand trial. *See also, Gori v. United States*, 367 U.S. 364 (1961) (judge declared a mistrial before government concluded its case).

Likewise, in *Arizona v. Washington*, the judge declared a mistrial because of defense counsel's misconduct in his opening statement. Such conduct, and the declaration of a mistrial necessitated by it, deprived the government of its one complete opportunity to require the accused to stand trial. Thus, this Court ruled that the Double Jeopardy clause did not prevent another trial.

While the results in those cases are consistent with the Court's recognition of society's interest in permitting the government its one clear opportunity to require the accused to stand trial, the deadlocked-jury cases are not consistent with either the government's recognized interest in "one, and only one" opportunity to require the accused to stand trial or, more importantly, the defendant's rights to be free of serial prosecutions and to have one tribunal consider the evidence against him. Indeed, this Court has not attempted to reconcile this inconsistency, stating only in summary fashion in *Arizona v. Washington* that permitting a second trial after a deadlocked jury "accords recognition to society's interest in giving the prosecution one

complete opportunity to convict those who have violated its laws." *Id.* at 509. The Court offered no real analysis of why the original trial did not offer that complete opportunity to convict.

What has evolved is a discordant doctrine that operates to give the government more than one clean shot at the accused even though the government has, by definition, not met its constitutional burden of proving guilt beyond a reasonable doubt to a unanimous jury. In a deadlocked-jury situation, the prosecution has just the same sort of opportunity to obtain a conviction as it does when the jury acquits. The only difference is that, in the acquittal scenario, the jurors reach a verdict and, in the deadlock scenario, they do not – but, in both, the government had a full opportunity and could not convince the jurors to convict.

The Court has nonetheless held to an erroneous articulation of the holding in *Perez*. It has never revisited or re-analyzed why that rule should apply or how it can be reconciled on principled terms with the Court's subsequent pronouncements that the purposes of double-jeopardy protection are to ensure that the government gets one complete chance at securing a guilty verdict while at the same time protecting citizens from multiple prosecutions.

This case offers a textbook example of the factors militating against serial prosecutions recognized in this Court's jurisprudence.

The government had an undeniably full and fair opportunity to convince a jury to convict Dr. Wecht of any one of 41 counts. During a seven-week trial, the government offered nearly four dozen witnesses and introduced thousands of pages of

exhibits. The defense rested without calling a single witness after challenging the government's case through cross-examination. Thus, the jury had before it only the testimony of the government's witnesses and almost exclusively the government's other evidence. Yet the jury did not find Dr. Wecht guilty on even one of the 41 counts submitted to it. The government clearly had the one complete "opportunity" to which *Arizona v. Washington* refers, and it was not able to persuade a jury that it had met its burden of proof. Now, Dr. Wecht may be forced to endure a retrial, a proceeding that will subject him to all of the ills described in *Arizona v. Washington:* financial and emotional burden, stigma and the risk of an erroneous conviction.

That result makes no sense in light of the Court's more recent explanation that the government's interest is in having one full opportunity to convict and that jeopardy attaches at jury selection, not verdict. The only reason to permit a second trial under such circumstances is to give the government a second chance at obtaining a guilty verdict with a different jury – a notion that is incompatible with the recognized protections of the Double Jeopardy Clause.

The reason the deadlocked-jury cases are so discordant with the rest of the Court's current double-jeopardy jurisprudence is the repeated and mistaken reliance on *Perez* for the rule that a genuinely deadlocked jury always presents manifest necessity for a mistrial such that a retrial would not offend the Double Jeopardy Clause.

The Court should use this case as the vehicle to reexamine the assumed holding in *Perez* in light of the Court's more fully developed double-jeopardy

jurisprudence in the 184 years since the Court decided *Perez*.[17] This case presents the issue in its clearest – and most troubling – setting.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

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October 2008

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[17] Dr. Wecht did not ask the court of appeals to reexamine the vitality of the deadlocked-jury holding of *Perez* because, of course, the court of appeals had no authority to reconsider this Court's precedent. That poses no barrier to this Court's review of the issue. *See Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982) (the Court may review purely legal questions even if not considered by court of appeals); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (same).

Supreme Court, U.S.
FILED

08-579 OCT 29 2008

OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court of the United States

CYRIL H. WECHT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,	:	No. 08-2258
v.	:	
CYRIL H. WECHT,	:	
Appellant.	:	

FISHER, *Circuit Judge.*

This appeal presents questions of both factual and legal significance. Factually, we write yet another chapter in the ongoing appellate saga surrounding the criminal prosecution of Dr. Cyril H. Wecht, a renowned former county coroner whose name and face have appeared in the media over the past several decades. Legally, we decide issues surrounding one of the most rooted and basic of our Constitution's guarantees of individual liberties: the right not "to be twice put in jeopardy of life or limb" for the same offense. U.S. CONST. amend. V.

I.

The facts of Wecht's celebrated past and more recent criminal charges are amply described in our previous opinions deciding interlocutory appeals in this matter. *See United States v. Wecht*, 484 F.3d 194, 197-98 (3d Cir. 2007) (*Wecht I*); *United States v. Wecht*, F.3d , 2008 U.S. App. LEXIS 16435, 2008 WL 2940375, at *1 (3d Cir.

Aug. 1, 2008) (*Wecht II*). We therefore need not dwell on those facts here.

We pick up the story on January 28, 2008, when trial began after a week of jury voir dire proceedings. At issue were forty-one counts of theft from an organization receiving federal funds, and wire and mail fraud. After twenty-three trial days, on March 17, 2008, counsel delivered closing arguments, and the District Court instructed the jury. Among its many instructions was the following:

> "The number of offenses charged is not evidence of guilt and should not influence your decision in any way. You must separately consider the evidence that relates to each charge, and you must return a separate verdict for each offense.
>
> For each offense charged you must decide whether the government has proven beyond a reasonable doubt that the defendant is guilty of that particular offense.
>
> Your decision on one offense, whether guilty or not guilty, should not influence your decision on any of the other offenses charged. Each offense should be considered separately."

The jury began its deliberations on March 18, 2008.

The following week, on March 27, 2008, the jury sent the District Court a note that read: "Out

of the 41 counts if any one or more count the jury cannot come to unanimous agreement on, does that constitute a hung jury?" The District Court consulted with counsel and, with their consent, sent the following written response to the jury:

> "The answer to your question is 'no.' It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict."

Another week later, on Thursday, April 3, 2008, the jury sent a note to the District Court, which included the following language:

> "After considering all counts in a variety of ways and in reconsideration of all individual opinions according to the court instructions – we have unanimously agree [sic] we have reached an impasse & respectfully request direction from the court. We agree additional deliberation would not be helpful."

The District Court read and showed this note to counsel and told them that it was inclined to poll the jurors individually to ask whether they were "hopelessly deadlocked" and whether further deliberations would lead to a unanimous verdict, and then to read to the jury Instruction 9.05 of the Third Circuit's model criminal jury instructions (Instruction 9.05).

After informing counsel of its intentions, the District Court allowed them time to consider the issue. After counsel deliberated, the Government suggested to the District Court that it send to the jury a note asking if it could reach a unanimous verdict on any of the counts because "the Government is not convinced that the jury understands or perhaps is apprised that a partial verdict is a possibility." The Government then suggested that, if the jury responded that it could not reach a partial verdict, the District Court should then give Instruction 9.05, but not conduct individual polling.

Defense counsel objected to the Government's proposed course of action. He suggested instead that the District Court bring the jurors into the courtroom and poll them individually, but if each expressed that additional deliberations would not break the deadlock, that the Court declare a mistrial and discharge the jury.

The District Court decided to do what it had originally suggested. Accordingly, it had the jurors return to the courtroom. It polled them individually, asking the following two questions: (1) "Do you agree that the jury is hopelessly deadlocked?"; and (2) "Do you believe that further deliberations would not lead to a unanimous

verdict?" Each responded to both questions affirmatively, i.e., that he or she believed the jury to be hopelessly deadlocked and that additional deliberations would not be helpful. The District Court then read Instruction 9.05 to them:

> "Members of the jury, I am going to ask you to return to the jury room and deliberate further. I realize that you are having some difficulty reaching unanimous agreement, but that is not unusual. And often after further discussion, jurors are able to work out their differences and agree.
>
> It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. Listen carefully to what the other jurors have to say, and then decide for yourself if the government has proved the defendant guilty beyond a reasonable doubt.

> What I have just said is not meant to rush or pressure you into agreeing on a verdict. Take as much time as you need to discuss things. There is no hurry.
>
> With that instruction, I will return you to the jury room. Thank you."[1]

The District Court then sent the jurors back to deliberate, which they did for an additional twenty minutes that day.

After the jurors left the courtroom, the Government renewed its request that the District Court ask the jurors collectively if they could reach a partial verdict. The District Court denied the request. After formal proceedings recessed, the Government filed a motion requesting for the third time that the District Court give the jury a partial verdict instruction. In a written filing on April 4, 2008, Wecht's counsel objected to the proposed instruction and cross-moved for a mistrial. He gave the following reason for mistrial:

> [T]he defense respectfully moves for the discharge of the jury and declaration of a mistrial in light of the jury's unqualified individual declarations that they are hopelessly deadlocked and that further deliberations would not lead to unanimous verdicts. Indeed, requiring

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[1] We have quoted Instruction 9.05 as it appears in our model criminal jury instructions. What the District Court actually read to the jury does not differ from the model in any material way.

> a jury to continue deliberations despite genuine and irreconcilable disagreement more often than not defeats the ends of public justice; not only will such compulsion needlessly waste valuable judicial resources, it may coerce erroneous verdicts."

Later that day, the District Court denied the Government's partial verdict instruction request, but did not at that time address the defense motion for a mistrial.

On Monday, April 7, 2008, after the jury resumed its deliberations for the first time since the prior Thursday, the District Court entered an order denying Wecht's written motion for a mistrial. The jury deliberated for four hours on that day.

Shortly before 9:00 the next morning, April 8, 2008, the District Court clerk telephoned counsel and entered the following on its docket: "Counsel for the Government and Defense and all parties are hereby ORDERED to appear today, 04/08/08 at 9:15 AM." Neither the telephone call nor the electronic notice described the purpose for which counsel were summoned.

At 9:20 a.m. on April 8, 2008, with the jury present, the District Court opened the proceeding as follows:

> "THE COURT: Good morning. Thank you all for gathering pursuant to the notice on the Electronic Case Filing system.

For your and the jury's safety and the preserved good order, I would ask that you follow the following instructions this morning:

Everyone should remain in their seats throughout this proceeding from now until when the jury and I exit the courtroom.

No one will be permitted to be running in and out of the courtroom as happened last week.

Secondly, I expect everyone to be quiet, and if anyone wants to make motions or objections to this proceeding or whatever, they may do so in writing on ECF, as we have done throughout the trial.

If anyone is unwilling to abide by these instructions, I will give you time now to exit.

Thank you for your assistance and cooperation.

The jury has informed the bailiff that they remain hopclessly deadlocked and are unable to reach a unanimous verdict on the defendant's guilt on any of the 41 counts and are unable to reach a unanimous verdict on the defendant not being guilty of any of the 41 counts.

The jurors' note will be marked as

Court Exhibit 13, and I have copies thereof, which you can pick up when we're done with this proceeding, which has deleted the names of presumably the foreperson and secretary.

The names of the jurors have not been released pursuant to my Order of Court. Until the Third Circuit determines otherwise, that will remain in effect.

Thus, defendant is still charged with each of the 41 counts with the constitutional presumption of innocence as to each of the 41 counts.

It is the government's responsibility to decide whether or not to retry the defendant.

Does the government have a decision today whether the government will retry the defendant?

[GOVERNMENT]: We do, Your Honor, and we will.

THE COURT: I would ask that by Friday at noon that the government file a notice as to which of the counts, which could be as few as one or as many as the 41, which of the counts will be tried in the retrial. Is the government prepared to proceed immediately to retry the case?

[GOVERNMENT]: We are, Your Honor.

THE COURT: Is the defense prepared to immediately retry the case?

[DEFENSE]: We will have several motions to make before that happens.

THE COURT: Okay. Just for everyone's scheduling purpose, I will set the trial for May 7th – excuse me – May 27th, which is the day after Memorial Day, May 27, 2008, at nine a.m.

That should give defense and the government sufficient time to file whatever motions they wish to respectively file. On behalf of the defendant, when would you like to file any motions you wish to file, sir?

[DEFENSE]: I will need some time to think about that. This is quite a surprise.

THE COURT: Okay. I know everyone needs a little rest, so I appreciate that matter. I would ask the defense, if you would kindly for me, please file any motions you have by noon on April 18, 2008.

If you find after reflection that date doesn't work for you, then just file an appropriate motion, and I will work with you in that regard.

> I will send out a scheduling order as to the May 27th, 2008 date without prejudice to whatever defendant's motions will come before me.
>
> Before I declare a mistrial and discharge the jury, I wish to express several things.
>
> First of all, I want to thank our wonderful court reporters . . . ."

After thanking various court personnel and the jurors, the District Court stated: "I declare a mistrial. I discharge the jury and the alternate jury . . . ." The jury note to which the District Court referred but which, as indicated, was not shown to counsel until after the jury was already discharged, stated in its entirety:

> "Pursuant to court instructions the jury contends we have exhausted all further deliberation efforts. We agree unanimously that we are unable to reach a unanimous verdict – on all 41 counts and are essentially deadlocked in the case of United States of America vs. Cyril H. Wecht."

On Monday, April 14, 2008, Wecht filed a motion to dismiss the indictment and preclude the Government from further prosecution in violation of the Double Jeopardy Clause of the Fifth Amendment. The Government responded on April 17, 2008. The District Court denied the motion on April 29, 2008.

In its twenty-one-page order denying the motion, the District Court offered a number of rationales. First, the District Court reasoned that, because Wecht had moved for a mistrial the previous week, he is deemed to have consented to the declaration of mistrial on April 8, 2008. Second, the District Court asserted that Wecht consented to the mistrial because, during the April 8, 2008 proceeding, his counsel did not object to the mistrial. Third, the District Court concluded that "it cannot be seriously disputed that the jury was hopelessly deadlocked, and that, therefore, manifest necessity required declaration of a mistrial and discharge of the jury."

That same day, Wecht filed a notice of appeal to this Court from the order denying dismissal of the indictment. Wecht also filed a motion in the District Court seeking a stay of the retrial pending appeal. The District Court denied that motion on May 2, 2008, writing in its fifteen-page order that Wecht's appeal to the Third Circuit was "frivolous" and that he was seeking "to delay these proceedings." Wecht then filed an emergency motion for a stay in our Court, which we granted on May 8, 2008.

II.

We have jurisdiction over the District Court's order denying Wecht's motion to dismiss the indictment on double jeopardy grounds under the collateral order doctrine. *Abney v. United States*, 431 U.S. 651, 659, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977). Whether retrial is permitted in accordance with the Double Jeopardy Clause depends on whether the first trial has ended with a properly declared mistrial. *United States v. Rivera*,

384 F.3d 49, 54 (3d Cir. 2004). The degree of deference we accord to the District Court's mistrial declaration varies depending on why the Court reached the decision, as well as whether it exercised sound discretion in reaching it. *See Arizona v. Washington*, 434 U.S. 497, 507-10, 98 S. Ct. 824, 54 L. Ed. 2d 717 & n.28 (1978). We will explore these degrees of deference later in the opinion. *See* III.C, *infra*.

III.

A. The Ideal

We begin by discussing the hallmark of sound discretion in this area: the procedures that district courts should follow prior to declaring a mistrial based on a deadlocked jury. *See United States v. Dixon*, 913 F.2d 1305, 1311 (8th Cir. 1990) ("What we seek is assurance on the record that the district court, in declaring a mistrial, acted responsibly and deliberately, and accorded careful consideration to [the defendant's] interest in having the trial concluded in a single proceeding." (internal quotation marks omitted)). We find useful the Third Circuit's model criminal jury instruction 9.06, approved in January 2007, which consists not of a jury instruction, but of the following comment (Comment 9.06):

> "If the jury indicates that it is still deadlocked after the court has given instruction 9.05 (Deadlocked Jury – Return for Deliberations), the Committee recommends the following procedure be followed and recorded.
>
> *First*, to determine whether a

supplemental charge is necessary, the court should question the foreperson, but must take steps to ensure that the foreperson does not reveal either the numerical split on the jury or the position of the majority. *See United States v. Fiorilla,* 850 F.2d 172, 175 (3d Cir. 1988); *Government of Virgin Islands v. Romain,* 600 F.2d 435, 16 V.I. 151 (3d Cir. 1979). For example, the court may address the foreperson as follows:

'Advise me of the status of deliberations. If the jury is divided, I do not want to know the numbers or the direction. I only want to know whether in your judgment there is a reasonable probability that the jury can arrive at a unanimous verdict in this case if sent back for further deliberations.'

Second, if the foreperson indicates that the jury is deadlocked, the court should question each juror, asking 'Do you agree that there is a hopeless deadlock which cannot be resolved by further deliberations?'

Third, if jurors' answers reflect that they are deadlocked, the court should excuse the jury and hold a hearing with counsel and the defendant. The court should elicit the positions of all the parties, taking particular care to get a record of the position of the defendant(s) and defense counsel on

whether to declare a mistrial. If the court declares a mistrial that is not required by manifest necessity, the Double Jeopardy Clause will bar a retrial of the case unless the defendant consented to the mistrial. *See United States v. Dinitz*, 424 U.S. 600, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976); *United States v. Rivera*, 384 F.3d 49 (3d Cir. 2004). When the defendant does not consent to the mistrial, the courts consider a number of factors to determine whether the mistrial represents an abuse of discretion and whether it bars further prosecution:

1. a timely objection by the defendant;

2. the jury's collective opinion that it cannot agree;

3. the length of jury deliberations;

4. the length of the trial;

5. the complexity of the issues presented to the jury;

6. any proper communications between the judge and jury;

7. the effects of exhaustion and the impact of coercion of further deliberations on the jury.

See [citation].

> If the court concludes that a mistrial is necessary, the court should make an explicit finding of manifest necessity. For example, the court may state:
>
> 'Based on an evaluation of the following factors (state factors relevant to case), I find that the jury is unable to reach a verdict, that further deliberations would be futile, and that there is no alternative but to declare a mistrial for reasons of manifest necessity and to dismiss the jury.'
>
> *Fourth,* the court should call the jury back into the courtroom and discharge the jurors."

Today we hold that district courts in our Circuit should follow the above procedure prior to declaring a mistrial based on a deadlocked jury. We use the word "should" instead of "must" because the orderly process of jury deliberations rests in the discretion of the trial judge, and we do not wish to bind his hands without regard to the factual and procedural history in any individual case. *See United States v. Trala,* 386 F.3d 536 (3d Cir. 2004) ("it is well-established that [a district court] has broad discretion to determine how long jury deliberations should continue"), *vacated on other grounds,* 546 U.S. 1086, 126 S. Ct. 1078, 163 L. Ed. 2d 849 (2006). We also note that some of our sister circuits have interpreted the Supreme Court's precedent in *Washington* to hold that "the trial judge does not have to make an explicit finding of 'manifest necessity' or expressly state that

particular alternatives were considered and rejected." *Dixon*, 913 F.2d at 1311.

Again, we do not turn Comment 9.06 into a mandate, but, all else being equal, a district court's explanation of its decision on the record helps the parties, this Court on appeal, and the district court itself in its exercise of sound discretion. *See id.* As such, we believe that there are few situations in which the procedure outlined in Comment 9.06 would not be the most desirable one to follow. Thus, it should be followed in cases involving a mistrial declaration based on a deadlocked jury.

In addition, district courts must follow Federal Rule of Criminal Procedure 26.3, which provides:

> "Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives."

Here, we use the word "must" because the Rule itself uses that word. We note further that Comment 9.06 states that "[t]he court should elicit the positions of all the parties" in the third step of its outlined procedure. We do not equate that recommendation in Comment 9.06 with the mandate in Rule 26.3 because doing so would attach a precise time stamp to Rule 26.3 when its text merely states, "[b]efore ordering a mistrial." At the same time, district courts should be mindful to follow Rule 26.3 at a sensible moment, which often will be one that is closer to the actual moment in

which a mistrial is declared. We will explain why shortly. *See* III.B, *infra*.

We have therefore summarized the ideal set of procedures – Comment 9.06 combined with Rule 26.3 at an opportune moment – to be followed by district courts when faced with the decision to declare a mistrial leading to the discharge of a deadlocked jury.

B. The Violation

The District Court here did not follow the ideal set of procedures as we have outlined in the previous subsection. It is clear that, after the jury indicated that it was still deadlocked after receiving Instruction 9.05 in full, the Court did not follow Comment 9.06. It did not question the foreperson, poll the jurors individually, or "hold a hearing with counsel and the defendant" outside the presence of the jury; it performed those actions before giving Instruction 9.05. The sequence matters because each time Instruction 9.05 or a similar supplemental charge is given, the jury deliberates further, and any progress that is made during those additional deliberations might be unaccounted for when the trial judge then declares a mistrial precipitously. By following Comment 9.06 just prior to declaring a mistrial, the trial judge ensures that those additional deliberations are reflected in his decisionmaking.[2]

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[2] It appears that the District Court gave Instruction 9.05 partially on March 27, 2008 in response to the jury's question pertaining to partial verdicts, and then gave it fully on April 3, 2008 in response to the jury's first expression of deadlock. It could be argued, then, that the District Court followed much of Comment 9.06 after it gave the partial Instruction 9.05. But the ideal, nonetheless, would have been

Further, the District Court did not "make an explicit finding of manifest necessity," under the seven factors listed in the third step of Comment 9.06, prior to calling the jurors back into the courtroom and discharging them. The Court's *ex post* order on April 29, 2008 comes far too late to serve to comply with Comment 9.06 when a mistrial was declared back on April 8, 2008. Still, because today's decision leaves Comment 9.06 as a recommendation instead of turning it into a mandate, we do not state that the Court "violated" Comment 9.06.

Federal Rule of Criminal Procedure 26.3, however, is another matter. Despite the District Court's proclamation that "[t]here can be no doubt, on the record before this Court, that over a five day period, this Court fully and faithfully complied with Fed. R. Crim. P. 26.3 in letter and in spirit," we find on the present record that the Court did indeed violate the Rule. We repeat that the Rule's text states only that a court must consult with counsel "[b]efore ordering a mistrial." The Court here did so consult before ordering a mistrial, specifically on April 3, 2008.

But April 3, 2008, was five days prior to when the District Court actually declared the mistrial. On the one hand, we could interpret "before ordering a mistrial" literally as any time (no matter of what duration) before ordering a mistrial, but doing so would effectively render the Rule a nullity. The 1993 Advisory Committee Notes to the Rule state, inter alia:

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for the District Court to follow all of Comment 9.06 after giving the full Instruction 9.05 and the jury again expressing deadlock.

> "The Rule ensures that a defendant has the opportunity to dissuade a judge from declaring a mistrial in a case where granting one would not be an abuse of discretion, but the defendant believes that the prospects for a favorable outcome before that particular court, or jury, are greater than they might be upon retrial."

Thus, consulting with counsel too early (and never doing so again prior to declaring mistrial), albeit within the literal text of the Rule, is not consistent with the spirit and purpose of the Rule. This is so because whether "the prospects for a favorable outcome" are greater in counsel's view depends on the full panoply of factual and procedural information available to counsel just prior to mistrial declaration, rather than well before that when counsel does not yet have that information. In sum, intervening events might change trial strategy, such that, when a trial judge follows Rule 26.3 too early, the corresponding hearing or consultation fails to represent the parties' position as accurately as it would were Rule 26.3 followed at a moment closer to the actual mistrial declaration.

The question then, is whether, in light of the present record, the District Court violated Rule 26.3 by "following" it too early. We answer this question in the affirmative. It was laudable for the District Court to consult with counsel as to what it should do after the jury's first note expressing deadlock. Nevertheless, too many intervening events transpired between that moment and the ultimate mistrial declaration for the Court to rely on its initial compliance with Rule 26.3 as

satisfying its obligation to follow the Rule for all intents and purposes until the jury's discharge. The intervening events included: (1) giving the jury Instruction 9.05 on a Thursday, (2) twenty minutes of additional deliberation that day, (3) recessing the jury for the weekend, (4) four additional hours of deliberation on the following Monday, and (5) a second jury note expressing deadlock phrased differently from the first. These intervening events heightened the possibility that counsel would have different views or arguments to make had the District Court consulted with them again after the events.

Moreover, the record in this case indicates that, when the District Court received the first jury note of deadlock on April 3, 2008, it had no intention to declare a mistrial at that time. In fact, it had already expressed to counsel its intention to poll the jurors individually and give them Instruction 9.05 before defense counsel requested a mistrial. The consultation that the District Court had with counsel on that date, therefore, was not pursuant to Rule 26.3, that is, designed to elicit counsel's views with respect to the propriety of a mistrial; rather, the consultation was a tangential one designed (1) to inform counsel of the first jury note expressing deadlock, and (2) to elicit their views as to how to respond to the note. Had defense counsel not asked for a mistrial at that juncture, that outcome might not have figured in the consultation at all.

Without the ability to resort to its conduct on April 3, 2008, the District Court has no basis on which to aver that it followed Rule 26.3 "fully and faithfully . . . in letter and in spirit." This is so because the District Court did not come close to

following Rule 26.3 at the April 8, 2008 proceeding. First, it did not show or read to counsel verbatim the second jury note until after mistrial was already declared. Second, it explicitly instructed counsel "to be quiet, and if anyone wants to make motions or objections to this proceeding or whatever, they may do so in writing on ECF, as we have done throughout the trial." Third, it announced the new development and its corresponding intentions in the jury's presence.[3] n3 At no time during that proceeding did the District Court solicit counsel's views as to the propriety of the impending mistrial declaration. The lack of information to counsel rendered difficult their ability to make an informed decision; the effective gag order rendered difficult any attempt by counsel to urge the District Court to follow Rule 26.3 at that time; and the fact that this all occurred in the jury's presence rendered difficult the ability of defense counsel to object or even ask for a sidebar, for fear that the jury would blame the defense for prolonging its term of service.

C. The Remedy

Our finding that a Federal Rule of Criminal Procedure has been violated does not, however, answer the question of what the remedy is for the violation. Wecht has moved to dismiss the indictment. Insofar as the motion is based on an alleged violation of the Double Jeopardy Clause caused by a retrial, we will address that argument

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[3] We are well aware that the District Court would have needed the jury in the courtroom to conduct polling, but the record is abundantly clear that the District Court had no intention of polling the jurors or following any other portion of Comment 9.06 or Rule 26.3 on April 8, 2008, other than simply discharging the jury.

shortly. But we must first reject Wecht's contention that the indictment must be dismissed merely because the District Court violated Rule 26.3.

"The federal criminal rules are not constitutional imperatives. . . . They are procedural only." *United States ex rel. Gaugler v. Brierley,* 477 F.2d 516, 523 (3d Cir. 1973). We reaffirmed this principle a year later in *United States v. Hall,* 505 F.2d 961 (3d Cir. 1974), in which we held that a violation of Federal Rule of Criminal Procedure 41(d), which mandated that the officer executing a search warrant properly inventory the property taken,[4] did not automatically result in the suppression of that property as evidence. 505 F.2d at 963. We explained that the irregularity in the officer's inventory procedure in that case was "not 'constitutionally significant' under the Fourth Amendment." *Id.* Although Rule 41(d) "outlines detailed procedures, it does not expressly address the remedies, if any, which flow from a failure to adhere to those procedures." *Id.* "[W]e do not believe that it was intended that every violation of the procedures in the rule, however insignificant and however lacking in consequences, should give rise to the remedy of suppression." *Id.* at 964.

Like Rule 41(d), Rule 26.3 contains no textual indication of what the remedy for any violation should be. In *United States v. Berroa,* 374 F.3d 1053 (11th Cir. 2004), the Court of Appeals for the Eleventh Circuit discussed this precise question and acknowledged that it was the first court of appeals to do so. *Id.* at 1056. Despite the district court's violation of Rule 26.3, the court of appeals found that the Rule "is not designed to

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[4] Rule 41(d) has since been amended.

change the substantive law governing mistrials." *Id.* (quoting 1993 Advisory Committee Notes). It then held that a violation of the Rule "is one factor to be considered in determining whether a trial judge exercised sound discretion" in declaring a mistrial. *Id.* at 1058-59. Notably, the court declined to hold that a violation of the Rule requires dismissal of the indictment to avoid a violation of the Double Jeopardy Clause. We agree that a violation of Rule 26.3 does not always mean that a mistrial was declared improperly as a matter of constitutional law, and accordingly hold that the remedy for a violation of Rule 26.3 is not automatically the dismissal of the indictment.

We thus proceed to explore the main issue raised in this appeal: whether, under the substantive law governing mistrials, the indictment against Wecht must be dismissed because the District Court improperly declared a mistrial. *See Rivera,* 384 F.3d at 54. "[I]t has long been held that the declaration of a mistrial sua sponte by a trial court does not automatically bar a future trial for the same offense." *Crawford v. Fenton,* 646 F.2d 810, 816 (3d Cir. 1981). The Double Jeopardy Clause permits retrial following a mistrial when, "taking all the circumstances into consideration, there is a manifest necessity for the [mistrial]." *United States v. Perez,* 22 U.S. (9 Wheat.) 579, 580, 6 L. Ed. 165 (1824).[5] "The question of whether 'manifest necessity' existed in the case before us is a mixed question of law and fact over which we exercise plenary review."

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[5] The analysis is different when the defendant consents to a mistrial. *See Love v. Morton,* 112 F.3d 131, 133 (3d Cir. 1997). At oral argument the Government conceded that Wecht did not consent to the mistrial in this case, so we proceed only under the "manifest necessity" analysis.

Rivera, 384 F.3d at 55. At the same time, where a mistrial is "premised upon the trial judge's belief that the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial[,] . . . [t]he trial judge's decision to declare a mistrial when he considers the jury deadlocked is . . . accorded great deference by a reviewing court." *Washington*, 434 U.S. at 509-510.

"The realities of litigation preclude a precise definition of 'manifest necessity'." *Rivera*, 384 F.3d at 55. Facts that might demonstrate manifest necessity include a hopelessly deadlocked jury, juror bias, and the unavailability of a prosecution witness. *Id.* at 55-56, 57. The Supreme Court has made it clear that appellate scrutiny decreases when the mistrial is based on a deadlocked jury, rather than the absence of a witness:

> "[T]he strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused.
> At the other extreme is the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial. The argument that a jury's inability to agree establishes reasonable doubt as to the defendant's guilt, and therefore requires acquittal, has been uniformly rejected in this country. Instead, without exception, the courts have

held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws.

Moreover, in this situation there are especially compelling reasons for allowing the trial judge to exercise broad discretion in deciding whether or not 'manifest necessity' justifies a discharge of the jury. On the one hand, if he discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his 'valued right to have his trial completed by a particular tribunal.' But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors. If retrial of the defendant were barred whenever an appellate court views the 'necessity' for a mistrial differently from the trial judge, there would be a danger that the latter, cognizant of the serious societal consequences of an erroneous ruling, would employ coercive means to break the apparent deadlock. Such a rule would frustrate the public interest in just judgments."

Washington, 434 U.S. at 508-10.[6] In other words, while manifest necessity is ultimately a legal issue over which we exercise plenary review, we accord considerable deference to a district court's judgment as to the existence of a deadlocked jury that manifestly necessitates a mistrial.

Here, the stated reason for mistrial was a deadlocked jury; we therefore turn to the record to determine whether it supports the District Court's conclusion that the jury was hopelessly deadlocked. Although the question of manifest necessity "abjures the application of any mechanical formula," *Illinois v. Somerville*, 410 U.S. 458, 462, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973), the following non-exhaustive, fact-intensive factors aid our appellate review of the District Court's determination of manifest necessity in the context of deadlocked juries:

> "1. a timely objection by the defendant;
> 2. the jury's collective opinion that it cannot agree;
> 3. the length of jury deliberations;
> 4. the length of the trial;

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[6] The difference in deference depending on the reason for mistrial shows why Wecht should not analogize his case entirely to our decision in *Rivera*. Although it articulates binding legal principles, *Rivera* is based on facts bearing little resemblance to those in this case. There, the district court declared a mistrial because of frequent delays, interruptions, and juror inactivity occasioned by the unavailability of the Government's key witness due to a leg injury. We held that the mistrial was improperly declared, emphasizing that "[w]hat makes this declaration . . . particularly troubling is that it was due to the absence of a prosecution witness." 384 F.3d at 57.

> 5. the complexity of the issues presented to the jury;
> 6. any proper communications between the judge and jury;
> 7. the effects of exhaustion and the impact of coercion of further deliberations on the jury[;]
> 8. whether the court provided counsel an opportunity to be heard;
> 9. whether the court considered alternatives to a mistrial; and
> 10. whether the court's decision was made after adequate reflection."

Comment 9.06 (factors one through seven); *United States v. Byrski*, 854 F.2d 955, 961 (7th Cir. 1988) (factors one through seven); *United States v. Brown*, 426 F.3d 32, 36-37 (1st Cir. 2005) (factors eight through ten); *see also United States v. Razmilovic*, 507 F.3d 130, 137-39 (2d Cir. 2007) (all ten factors). Again, our enumeration of these factors is meant to guide district courts and our appellate review in a clear fashion; we do not mean to suggest that all factors are relevant in all cases or that some other appropriate consideration might not animate a district court's determination.

We address each factor in turn, beginning with factors eight through ten because they focus on the District Court's procedures (and hence sound discretion) in rendering its decision and impact the degree of deference we otherwise would accord under *Washington*. We note preliminarily that factor eight mirrors Rule 26.3, and we equate them for purposes of this discussion. Next, we already have stated that the District Court fell short of the ideal with respect to its decisionmaking process; not only did it ignore Comment 9.06, it

also violated Rule 26.3. But we have also held that these failures do not automatically result in the remedy of dismissal of the indictment. In *Berroa*, the Eleventh Circuit explained:

> "Although Rule 26.3 now mandates that which was previously strongly advised, the failure to hear from the parties has invariably been a factor to be considered when applying the manifest necessity test. Consistent with the adoption of Rule 26.3, a trial court's failure to hear from the parties remains as one of several factors to be considered in determining whether the trial court exercised sound discretion. Consistent with the manifest necessity test, the extent to which a Rule 26.3 violation indicates a lack of sound discretion must be considered and resolved based upon the individual and varying circumstances of each case. As Rule 26.3 mandates that a trial court provide the parties an opportunity to be heard, the failure to comply with that mandate necessarily creates a strong suggestion that a trial judge did not exercise sound discretion."

374 F.3d at 1058; *see also Rivera*, 384 F.3d at 56 ("[t]he dialogue fostered by Rule 26.3 ensures that only those mistrials that are truly necessary are ultimately granted"); *United States v. Bates*, 917 F.2d 388, 396 (9th Cir. 1990) ("trial courts are much more likely to have exercised sound discretion when they listen to the parties before declaring a mistrial").

Today we hold, in accordance with our sister circuit, that a violation of Rule 26.3 lessens the degree of deference we accord to a district court's finding of manifest necessity. Under *Washington,* we generally give the highest degree of deference to a district court's judgment that a deadlocked jury manifestly necessitates a mistrial. 434 U.S. at 508-10. But "the deference accorded the trial judge's finding of manifest necessity can disappear, even in the classic case of a hung jury, when the trial judge has not exercised sound discretion." *Berroa,* 374 F.3d at 1057 (citing *Washington,* 434 U.S. at 510 n.28). Exactly how much deference is lessened is not an exact science: we still are much more likely to sustain a mistrial declaration based on a genuinely deadlocked jury than on any other basis, but our review will be somewhat more rigorous when we perceive procedural flaws in a district court's decision.

Our deference to the District Court's determination of manifest necessity in this case is further decreased by factors nine and ten – whether the court considered alternatives to a mistrial and whether it made its decision after adequate reflection. *See Bates,* 917 F.2d at 396 ("A trial court's abrupt declaration of a mistrial suggests that it failed to exercise sound discretion."). Although the District Court gave Instruction 9.05 as an alternative to mistrial on April 3, 2008, it did not consider whether it might be fruitful to give it or another supplemental instruction again on April 8, 2008. We acknowledge that it is possible that the District Court might have considered alternatives or given additional reflection to the matter in its subjective mind. But we decline to credit these private thoughts – assuming arguendo that they existed – under

factors nine and ten of our review when they do not manifest themselves on the record. *See id.* at 395 ("Determining that a mistrial was proper and retrial permissible because reversal was certain is an objective, not subjective, inquiry to be based on the record as it existed at the time of the mistrial.").

Some loss of deference due to district court procedures indicative of a lack of sound discretion, however, does not necessarily mean that there was no manifest necessity to declare a mistrial as a matter of substantive fact. *See Brown*, 426 F.3d at 37 ("The overarching question on appeal is whether the district judge's declaration of a mistrial was [manifest]ly necessary under all the circumstances." (internal quotation marks omitted)). As we previewed in the jurisdictional section of this opinion, *see* II, *supra*, our standard of review is impacted by a district court's exercise of sound discretion. A district court still could have come to a correct conclusion based on the record facts; we simply elevate our appellate scrutiny when a district court violates Rule 26.3 or makes other significant procedural errors in reaching that conclusion.

This is precisely what happened in *Berroa*. There, the defendant appealed the district court's allegedly improper declaration of a mistrial under procedural circumstances similar to the case at bar. The defendant was tried on various drug, firearm, and conspiracy charges. 374 F.3d at 1055. After a day or so of deliberations, the jury sent a note to the district court stating: "We have agreed on some counts. However, we are unable to come to a decision on others." *Id.* At that point (May 29th), the district court consulted counsel for all parties

and then gave a modified *Allen* charge (akin to our Instruction 9.05), and the jury continued its deliberations. *Id.* A day later (May 30th), the jury informed the court: "We again have made some decisions. However we can not [sic] come to an agreement on others." *Id.* The district court declared a mistrial on each of the undecided counts, without providing the parties an additional opportunity to comment or recommend alternatives, as required by Rule 26.3. *Id.*

In analyzing whether this procedural history exhibited manifest necessity for a mistrial, the Court of Appeals for the Eleventh Circuit stated:

> "[T]he events leading to the decision to declare a mistrial were not rapid, and we cannot say that the trial judge's decision was precipitous. Without dispute, after receiving the jury's note on the afternoon of May 30 declaring that it could not agree on some counts, the district court convened counsel and the jury, took the verdict and immediately declared a mistrial as to the other counts. Significantly, before declaring the mistrial, the district court consulted neither the defense attorneys nor the government.
>
> The events of the afternoon of May 30, however, do not stand in isolation. The jury's note on that date was the second such note from the jury. In response to the first note, sent on May 29, the court gave the jury a modified *Allen* charge. Additionally, the second note was not sent shortly after the jury

> began deliberations, but on the third day of deliberations and the day after receiving the modified *Allen* charge. Considered as a whole, the circumstances reveal that the court's decision was not an abrupt, precipitous response to a single note from the jury, but was a deliberate decision made subsequent to three days of deliberations, a prior note declaring an inability to agree, and the jury's prior receipt of a modified *Allen* charge.
>
> . . .
>
> On balance, we find that the district court erred in failing to consult with the parties prior to declaring a mistrial after receiving the second note from the jury stating its inability to reach a decision. While this error weighs in favor of a finding that the trial judge did not exercise sound discretion, the remainder of the record is to the contrary. Accordingly, we find that the trial judge exercised sound discretion and defer to his finding of manifest necessity to declare a mistrial."

Id. at 1059-60. The facts relevant to manifest necessity in our case – two jury notes, the district court's consultation with counsel after the first jury note but violation of Rule 26.3 after the second jury note – parallel *Berroa* almost exactly. Therefore, our own analysis of manifest necessity appropriately conforms with *Berroa*'s.

Returning, then, to the Comment 9.06 factors that aid in our appellate review of a district court's finding of manifest necessity, we do not believe that the first factor – a timely objection by the defendant – carries much weight in this case. On the one hand, it was Wecht who argued rather vigorously for a mistrial on April 4, 2008, explaining that his written motion was filed "in light of the jury's unqualified individual declarations that they are hopelessly deadlocked and that further deliberations would not lead to unanimous verdicts." On the other hand, we have already explained why the District Court's course of action on April 8, 2008, rendered difficult the ability of defense counsel to object at that time. Hence, the first "manifest necessity" factor of whether the defendant timely objected does not weigh in favor of or against a mistrial.

What carries far more weight in this case is the second factor: the jury's collective opinion that it cannot agree. Here, we have two notes expressing jury deadlock.[7] The first note – and Wecht's motion of April 4, 2008 confirms this interpretation – clearly expresses that the jury was hopelessly deadlocked and that no additional deliberations would help the jury reach a unanimous verdict on any of the counts. *See Byrski*, 854 F.2d at 962 (earlier determination by district court that additional deliberations would be helpful "does not, however, expunge the record of all prior

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[7] Even more accurately, we have three such notes. The jury's March 27, 2008 note, though phrased as a question about hung juries, already hinted at the emergence of an impasse. For the sake of clarity, however, the remainder of the discussion in the principal text will refer to the April 3, 2008 note as the first note and the April 7 (or 8), 2008 note as the second note.

evidence of deadlock," when prior notes sent by jury indicated deadlock). Wecht argues on appeal that the second note expressing jury deadlock detracts from, rather than reaffirms, the first note. We disagree.

In this regard, Wecht argues first that the jury might have been close to a verdict because the second note uses the phrase "essentially deadlocked" rather than "hopelessly deadlocked." However, we are unwilling to hold the jury to Webster's Dictionary's precise definition of adverbs and thereby read a material distinction between "essentially" and "hopelessly," or more specifically, that "essentially deadlocked" might somehow indicate an imminent break in the deadlock. *See United States v. Vaiseta*, 333 F.3d 815, 819 (7th Cir. 2003) (defendant's "'might have' argument, without any evidence that his rights and interests were compromised by the declaration of a mistrial, cannot prevail against the specific facts and circumstances of this case"). We thus doubt that the jury intended to water down its expression of deadlock by using a different adverb in the second instance. Instead, any clear movement toward a unanimous verdict between the two notes is perceptible only if one reads the second note in a highly counterintuitive manner.

Second, Wecht argues that the second note states that the jury was unable to reach a verdict "on all 41 counts," which implies that it could reach or was close to reaching a verdict on some subset of those counts. We believe that the likelihood of this misunderstanding is low. The District Court's March 27, 2008 response to the jury, which stated that the inability to reach a unanimous verdict on only some of the counts does not constitute a hung

jury, should have cleared up any confusion, especially in light of the Court's abundantly clear partial verdict instruction on March 17, 2008.[8] Even assuming arguendo that any confusion lingered, we simply do not agree that it offsets the jury's repeated expression of genuine deadlock.

We move on, then, to the third through fifth factors dealing with the length and complexity of trial and length of deliberations, noting preliminarily that "[t]here is no uniform minimum period during which a jury must deliberate before the court may declare a hung jury." *United States ex rel. Webb v. Court of Common Pleas*, 516 F.2d 1034, 1044 (3d Cir. 1975). Here, the trial lasted for twenty-three days, and the jury deliberated for a total of 54.5 hours over a period of ten days. On the one hand, the issues were relatively complex in that there were forty-one counts. On the other hand, there was only one defendant. *See Byrski*, 854 F.2d at 963 ("Although the length of the jury's deliberation [approximately thirty hours over thirteen days] was not excessive considering the complexity and length of the trial [seven defendants and multiple charges against each defendant tried for thirty-two days over an eight-week period], neither was it so insubstantial as to cast doubt on the correctness of the judge's mistrial declaration.").[9] We believe that, on this record, the

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[8] We further note that Wecht himself had objected vigorously to a partial verdict instruction on April 3 and 4, 2008.

[9] We contrast our case, for example, with the Second Circuit's decision in *Razmilovic*, in which the court barred retrial. There, the district court decided "that a single jury note indicating deadlock created a 'manifest necessity' to declare a mistrial." 507 F.3d at 133. Also, the jury had deliberated for only three days after a six-week trial involving

amount of deliberation time corresponded sufficiently to the length and complexity of the trial, such that these factors weigh in favor of the District Court's finding of manifest necessity.

The sixth factor – any proper communications between the judge and jury – also weighs in favor of the District Court's finding because the Court individually polled the jurors, asking whether they were "hopelessly deadlocked," and each juror confirmed what the collective note stated. Although the timing of this polling was not ideal, *see* III.B, *supra*, the District Court nonetheless performed it at a sufficiently informative juncture to reveal that each juror believed that further deliberations would not help him in reaching a unanimous verdict. The issuance of Instruction 9.05 also constituted a proper communication from the judge back to the jury (as well as an alternative to mistrial) to give the jury one more opportunity to reach a unanimous verdict. *See United States v. Joyner*, 201 F.3d 61, 83 (2d Cir. 2000) (proper mistrial declaration following protracted deliberations, *Allen* charge, and polling of jurors, even though defendants claimed that they "were not given the opportunity to be heard on the issue"); *United States v. Simpson*, 94 F.3d 1373, 1377 (10th Cir. 1996)

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three defendants, twenty-one separate counts, and forty witnesses. *Id.* at 139. There was also no individual polling of jurors. *Id.* By stark contrast, the District Court here received two jury notes, polled the jurors individually after the first, and gave them Instruction 9.05 after nine days of deliberation over one defendant after a six-week trial. There was then an additional half-day of deliberation on April 7, 2008. This completely different record does not contain facts akin to the ones that prompted the Second Circuit to reverse in *Razmilovic*.

(proper mistrial declaration following jury's repeated expression of deadlock and jury foreman's confirmation, even though "the court did not provide the parties with a hearing on the necessity of a mistrial"). The communications between the District Court and the jurors both individually and collectively thus buttress the conclusion that the eventual second note expressing jury deadlock represented a genuine deadlock that could not be broken.[10]

In sum, the record as a whole in this case supports the District Court's conclusion that there was "manifest necessity" to declare a mistrial without Wecht's consent. As a result, the District Court may retry Wecht without violating the Double Jeopardy Clause, and so it did not err in denying Wecht's motion to dismiss the indictment.

IV.

Our holding today that there is no constitutional bar to retrying Dr. Wecht does not stand for the proposition that he must be retried. That is a decision that rests with the Government. Indeed, Wecht's prosecution is one that already has spanned more than thirty months. It has resulted

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10 As for the seventh factor relating to the danger of a coerced verdict, we need not dwell on it. There was obviously a possibility that the jury might be coerced into a verdict had it been sent back for further deliberations. Yet, the District Court made no finding to this effect on the record, and we do not presume to know how exhausted the jury was at the point of mistrial declaration. Again, had the District Court made explicit findings for each factor under Comment 9.06, we would be in a much better position to assess this factor. Nonetheless, as in *Berroa*, the balance of the factors, even under a less deferential standard of review, weigh strongly in favor of the District Court's finding of manifest necessity.

in numerous appeals and emergency motions to this Court and, with the filing of this opinion, three lengthy precedential opinions.

If the Government chooses to proceed with a retrial, our view is that both sides and the interest of justice would benefit from a reduced level of rancor in the courtroom, fresh eyes on the case, and fewer forays to this Court by the parties, including intervening parties. This has been a highly charged, lengthy, and complex case involving serious criminal charges brought against a prominent public figure. The trial judge has been the referee in a heavyweight fight, and, as we have ruled, has generally made the correct calls, with some exceptions. *Wecht II*, for example, noted that the District Court initially failed to follow our mandate from an earlier order. *See* F.3d at , 2008 U.S. App. LEXIS 16435, 2008 WL 2940375, at *1 n.1. And in today's decision, even though there was manifest necessity to declare a mistrial in satisfaction of the Fifth Amendment, the District Court reached that conclusion through a highly flawed set of procedures. *See* III.B, *supra*.

Therefore, in the exercise of our supervisory powers under 28 U.S.C. § 2106, *see, e.g., Gov't of the Virgin Islands v. Walker*, 261 F.3d 370, 376 (3d Cir. 2001), *see also Liteky v. United States*, 510 U.S. 540, 554, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994), we will direct that Judge Schwab be relieved of further duties on this case and that the Chief Judge of the District Court assign a new judge to handle any future matters in the case including any retrial. Although we tread cautiously because "[t]he decision to remove a judge from an ongoing trial should be considered seriously and made only rarely," *Huber v. Taylor*, 532 F.3d 237, 251 (3d Cir.

2008), this case has progressed so unusually as to become sui generis. *See, e.g., Living Designs, Inc. v. E.I. Dupont de Nemours and Co.*, 431 F.3d 353, 372-73 (9th Cir. 2005) (concluding under 28 U.S.C. § 2106 that, even absent allegations of bias, because of the highly unusual procedures the trial judge employed, "the appearance of justice requires reassignment on remand"); *Sobel v. Yeshiva Univ.*, 839 F.2d 18, 37 (2d Cir. 1988) (concluding "that it is necessary to remand the case to a different district judge" because court of appeals was "disturbed by the manner in which the district court treated this case on our initial remand").

We thus end this chapter in the Wecht appellate saga by coming full circle. In *Wecht I*, the issue of whether Judge Schwab should be recused for bias figured prominently in the appeal. In that opinion our dissenting colleague concluded under 28 U.S.C. § 455 "that another judge should preside over the trial of Wecht." 484 F.3d at 236 (Bright, J., dissenting).[11] As we have just described, the problem today is not so much the appearance of bias as it is the appearance of litigation at a combative tenor that likely will not abate were Judge Schwab to stay on the case. We therefore direct that a less invested adjudicator take over from here.

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[11] Certainly Wecht should be pleased with our reassignment of the case. Not only did he move for Judge Schwab's recusal at issue in *Wecht I*, he did so again under § 455 in the form of a petition for writ of mandamus to our Court, which we denied on January 2, 2008. Wecht then moved for recusal again under § 455 more recently on April 21, 2008. Judge Schwab denied the motion on May 8, 2008.

V.

For the foregoing reasons, we will affirm the District Court's order denying Wecht's motion to dismiss the indictment. We nonetheless will exercise our supervisory power and remand this case to the Chief Judge of the District Court to reassign the case to a different judge.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

UNITED STATES OF AMERICA,	:	No. 06-cr-26
v.	:	
CYRIL H. WECHT	:	

ORDER OF COURT DENYING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT AND TO PRECLUDE THE GOVERNMENT FROM FURTHER PROSECUTION IN VIOLATION OF THE PROHIBITION AGAINST DOUBLE JEOPARDY (DOC. NO. 868)

Before the Court is Defendant's Motion to Dismiss the Indictment and to Preclude the Government from Further Prosecution in Violation of the Prohibition Against Double Jeopardy (doc. no. 868). After giving due consideration to defendant's motion, his brief in support (doc. no. 869), and the government's brief in response thereto (doc. no. 915), Defendant's Motion to Dismiss the Indictment and to Preclude the Government from Further Prosecution in Violation of the Prohibition Against Double Jeopardy has no factual basis or any legal authority that arguably supports his position, and, therefore, the motion is denied.

Where, as here, a defendant moves a trial court to declare a mistrial, the Double Jeopardy Clause is simply not implicated. Defendant twice moved the Court to declare a mistrial and discharge the jury in this case, arguing that the jury already had unambiguously announced that it was hopelessly deadlocked on all counts, which the Court confirmed by individual polling of each juror.

Further, it is black letter Double Jeopardy law that the government may retry a defendant following a mistrial where the record shows, as it does beyond any shadow of a doubt in this case, that there is manifest necessity for declaration of the mistrial. Nowhere is manifest necessity more obvious than in this case – one that the United States Supreme Court describes as the "classic" manifest necessity situation. After two additional days of deliberation following this Court's standard "deadlocked jury" instructions to return to the jury room and continue to deliberate after it initially indicated it had reached an impasse, the jury unequivocally declared: "Pursuant to court instructions the jury contends we have exhausted all further deliberation efforts. We agree unanimously that we are unable to reach a unanimous verdict on all 41 counts and are essentially deadlocked in the case of United States of America vs. Cyril H. Wecht." See Court Exhibit C-13; Minute Entry for April 8, 2008 (doc. no. 858), and Transcript for April 8, 2008 (doc. no. 874).

Thus, under basic, well-established and *entirely non-controversial* Double Jeopardy principles, Defendant's Motion to Dismiss the Indictment and to Preclude the Government from Further Prosecution in Violation of the Prohibition Against Double Jeopardy (doc. no. 868) must be

denied.

Background.

1. March 27, 2008.

On the fifth full day of jury deliberations, on March 27, 2008, the Court received, through the bailiff, a written message from the jury, marked as Court Exhibit 5, stating that "out of the 41 counts if any one or more count the jury can not come to unanimous agreement on - does that constitute a hung jury"? Although its message suggested that the jury had been able to reach verdict on some but not all counts, the message was ambiguous. After hearing from counsel as to their respective positions, the Court declined the government's request to give a "partial verdict" instruction at that time,[1] and instead gave the supplemental

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[1] Section 9.08 of the Model Jury Instructions in Criminal Cases, as recently recommended by the Third Circuit Committee on Model Criminal Jury Instructions, provides:

> Members of the jury, you do not have to reach unanimous agreement on all the charges before returning a verdict on some of them. If you have reached unanimous agreement on some of the charges, you may return a verdict on those charges, and then continue deliberating on the others. You do not have to do this, but you can if you wish. You should understand that if you choose to return a verdict on some of the charges now, that verdict will be final. You will not be able to change your minds about it later on. Your other option is to wait until the end of your deliberations, and return all your verdicts then. The choice is yours. I would ask that you now return to the jury room and resume your deliberations.

instruction that was suggested by defense counsel, and agreed to by the government, that the jury should continue its deliberations, using the language approved by the United States Court of Appeals for the Third Circuit in *United States v. Fioravanti,* 412 F.2d 407, 419-20 (3d Cir. 1969).

2. April 3, 2008.

About one week later, on April 3, 2008, the jury sent another written note through the bailiff to the Court, marked as Court Exhibit C-12, stating that it unanimously agreed it had reached an "impasse" and agreed that "additional deliberations would not be helpful." The Court conferred with counsel again, indicating it intended to poll the jurors individually and then deliver an additional charge to the jury and return it to the jury room for further deliberations. The Court gave the parties and counsel additional time to consider this suggestion.

The government's position was that the Court render the partial jury instruction set forth in the Model Jury Instructions at Section 9.08. Defendant agreed with the Court that the individual jurors should be polled, but requested the Court to declare a mistrial and discharge the jury immediately if polling confirmed that the jury was hopelessly deadlocked. Transcript, March 27, 2008 (doc. no. 910), at 14-15. See also "Defendant's Objections to Government's Proposed Jury Instructions Regarding Partial Verdict (Document No. 850) and Cross Motion to Discharge the Jury" (doc. no. 852) at 5.

This Court denied both alternatives requested by counsel, *i.e.*, the government's requested partial verdict instruction and defendant's oral motion for a mistrial. As is the customary practice in the United States District Court for the Western District of Pennsylvania to instruct the jury to return to further deliberate *at least once* after being advised that it has been unable to reach a verdict, the Court brought the jury to the Courtroom and instructed it, following the Supplemental Instruction at Section 9.05 of the Model Jury Instructions for Criminal Trials recommended by the Committee for the United States Court of Appeals for the Third Circuit on Model Criminal Jury Instructions, that it should continue its deliberations, and returned the jury to deliberate for as long as the jury deemed appropriate. Defendant requested the Court to set a deadline or time table on additional jury deliberations, which the Court declined to do.

The jury informed the Court, through the bailiff, that it agreed to return on Monday, April 7, 2008, to continue its deliberations at 8:00 am. The Court excused the jury for the day, shortly after 2:00 pm, at the jury's previously requested departure time. Later that same day, the government filed a written request that the Court give the supplemental "Partial Verdict Instruction" before deliberations resumed, advising the jury that it could return verdicts on some, but not all, of the counts of the indictment, if it was able to reach unanimous verdict on some counts but not others, based on the jury's previous message of March 27, 2008. The Court "text- only" ordered a response to the government's proposed supplemental "Partial Verdict Instruction" by the following day.

3. April 4, 2008.

On April 4, 2008, defendant filed "Defendant's Objections to Government's Proposed Jury Instructions Regarding Partial Verdict (Document No. 850) and Cross Motion to Discharge the Jury." (doc. no. 852). In strenuously opposing the government's request for a partial verdict instruction and zealously advocating for an immediate declaration of mistrial and discharge of the jury before it returned to deliberate on April 7, 2008, defendant argued, in most pertinent part, as follows:

> There is no basis to now instruct the jury on a partial verdict or to give Model Instruction 9.08 as requested for the third time by the prosecution. *In fact, for reasons stated yesterday and as set forth herein, the defense moves this Court for the discharge of the jury in light of the fact that all jurors confirmed the existence of a hopeless deadlock and that further deliberation would not lead to a unanimous verdict.*
>
> Instead, the *defense submits that the procedure followed yesterday by the polling of the jury, after the prior instruction given on March 27, 2008, were the equivalent under the circumstances of the deadlocked jury procedures of Model Instruction 9.06.* Those instructions specifically counsel the Court to ask each juror: Do you agree that there is a hopeless deadlock which cannot be resolved by further

deliberation. *That is exactly what the Court asked each juror by the two questions posed to each juror. Model Instruction 9.06 further advises as to the procedure to be used if the jury confirms a hopeless deadlock and those procedures specify that the Court should obtain the defense position on whether to declare a mistrial, which the defense did provide the Court yesterday.*

...the jury squarely indicated that it considered all counts in a variety of ways, had followed the prior supplemental instruction to consider all individual opinions and thereafter each juror agreed they were hopelessly deadlocked and that further deliberations would not lead to unanimous verdicts.

To now give a partial verdict instruction in a supplemental charge under these circumstances clearly is the usual ominous context by which it could operate as a dynamite charge to blast a hung jury into a verdict. *United States v. Fioravanti*, 412 F.2d 407, 419 (3d Cir. 1969). Indeed, to provide such an instruction on Monday could hardly be seen as anything other than the Court providing the jury a way out of the *hopeless deadlock each juror has attested to on the record. . . .*

...[T]he Court properly declined to give

> the requested supplemental instruction twice before and should do so again. Moreover, and as set forth herein, *the defense respectfully moves for the discharge of the jury and declaration of a mistrial in light of the jury's unqualified individual declarations that they are hopelessly deadlocked and that further deliberations would not lead to unanimous verdicts.* Indeed, requiring a jury to continue deliberations despite genuine and irreconcilable disagreement more often than not defeats the ends of public justice; not only will such compulsion needlessly *waste valuable judicial resources,* it may coerce erroneous verdicts. United States v. See, 505 F.2d 845 (9th Cir. 1975).

"Defendant's Objections to Government's Proposed Jury Instructions Regarding Partial Verdict (Document No. 850) and Cross Motion to Discharge the Jury." (doc. no. 852), at 4-6.

4. April 7, 2008.

On April 7, 2008, this Court entered its "Order of Court Denying Defendant's Motion for Reconsideration of Denial of Motion for Mistrial Embedded in Document No. 845" (doc. no. 855). This Order sets forth the procedural and factual background necessary to place in context defendant's pending motion to dismiss on double jeopardy grounds – a motion that *diametrically contradicts* his stated position that the jury's collective and "unqualified individual declarations

that they are hopelessly deadlocked and that further deliberations would not lead to unanimous verdicts" required declaration of a mistrial and discharge of the jury. The Court's Order of April 7, 2008, is repeated below:

> Before the Court is "Defendant's Objections to Government's Proposed Jury Instructions Regarding Partial Verdict (Document No. 850) and Cross Motion to Discharge the Jury." (doc. no. 852). Although called a "Cross Motion," there are no pending motions to which this one can be reasonably be considered to be "crossed," and the relief sought is obviously in the nature of a motion to reconsider the Court's ruling of April [3][2], 2008, denying defendant's oral motion to declare a mistrial and discharge the jury. The background for defendant's motion to reconsider is as follows:
>
> A previous message from the jury, on March 27, 2008, Court Exhibit 5, stated that "out of the 41 counts if any one or more count the jury can not come to unanimous agreement on - does that constitute a hung jury"? Although that message suggested that the jury had been able to reach verdict on some but not all counts, the

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[2] Some of the dates in this Order were inadvertently stated as one day earlier than the event described, but the substance of the Order remains unaffected by this error. The correct dates have been inserted in brackets.

message was ambiguous, and, therefore, the Court declined to give a partial verdict instruction at that time, after hearing from counsel, and instead gave the supplemental instruction suggested by defense counsel, and agreed to by the government, that the jury should continue deliberations. The Court used the language approved by the United States Court of Appeals for the Third Circuit in *United States v. Fioravanti*, 412 F.2d 407, 419-20 (3d Cir. 1969).

The Court did not hear from the jury again about the status of its deliberations until April 3, 2008, when it sent a written message through the bailiffs that it unanimously agreed it had reached an "impasse" and agreed that "additional deliberations would not be helpful." Court Exhibit C-12. The government suggested the Court render the partial jury instruction set forth in the Model Jury Instructions at Section 9.08, and defendant requested the Court to declare a mistrial and discharge the jury immediately, based on his belief that the jury was hopelessly deadlocked. See "Defendant's Objections to Government's Proposed Jury Instructions Regarding Partial Verdict (Document No. 850) and Cross Motion to Discharge the Jury" (doc. no. 852) at 5.

This Court denied both the

government's requested partial verdict instruction and defendant's oral motion for a mistrial. As is the customary practice in the United States District Court for the Western District of Pennsylvania to instruct the jury to return to further deliberate at *least once* after being advised that it has been unable to reach a verdict, the Court brought the jury to the Courtroom and instructed the jury, pursuant to Supplemental Instruction at section 9.05 of the Model Jury Instructions for Criminal Trials recommended by the Committee for the United States Court of Appeals for the Third Circuit on Model Criminal Jury Instructions, that it should continue its deliberations, and returned the jury to deliberate for as long as the jury deemed appropriate, over defendant's objections that the Court should impose some arbitrary time table on the jury.

The jury informed the Court, through the bailiff, that it agreed to return on Monday, April 7, 2008, to continue its deliberations at 8:00 am. The Court excused the jury for the day . . . shortly after 2:00 pm, at the jury's previous requested time. At 3:45 pm that same day, the government filed a written request that the Court give a supplemental "Partial Verdict Instruction" advising the jury that it could return verdicts on some, but not all, of the counts of the indictment, if

it was able to reach unanimous verdict on some counts but not others, based on the jury's previous message of March 27, 2008. The Court "text-only" ordered a response by 1:00 pm, the next day, Friday, April [4] 2008.

Defendant filed a motion requesting an enlargement of time to file its response (doc. no. 851) until 4:00 pm, which the Court granted in part, directing the response by 3:00 pm. There is no suggestion or hint in his motion to enlarge the time to respond to the government's requested supplemental jury instruction, that defendant would also move the Court to reconsider its ruling denying his oral motion for a mistrial, nor for that matter, that he intended to request any other affirmative relief or ruling from the Court.

The Court denied the government's requested supplemental instruction by text-only order at 4:37 pm, April [4], 2008, and went home for the weekend. On Saturday, April [5], 2008, at 12:28 pm, despite all counsel having previously been ordered, more than once, not to communicate with the Court's staff by e-mail and instead to file requests on ECF docketing system, Mr. McDevitt e-mailed the Court's law clerks to their Court Lotus accounts, which they do not usually check on the weekends, as counsel has

been advised more than once, with the following message:

> Mickey and Nicole,
>
> *Yesterday we filed a cross motion, supporting brief and proposed order requesting the jury be discharged and a mistrial declared.* The relief requested seeks an order before jury deliberations begin on Monday.
>
> The Court has not ordered the Government to respond or otherwise indicated it intends to adjudicate our motion in timely fashion. *We respectfully request that the Court issue a briefing schedule and adjudicate our motion prior to Monday's resumption of jury deliberations.*
>
> (Attached hereto).

Defense counsel appears to be philosophically opposed to filing actual motions on the ECF docketing system *as motions* when he seeks some affirmative relief from the Court, as he has been repeatedly ordered to do. Filing motions as motions ensures that the Court will order a prompt response from the opposing party, and that said motion will be promptly addressed, conversely, not filing a motion as a motion, but instead as

some part of some other document, such as a response to a requested jury instruction, will not be docketed as a motion on ECF.

Indeed, defendant's "cross motion" is not a "cross" to any pending motion, as it incorrectly but, the Court finds, purposefully implies, and ECF did not pick this item up as a motion because it was deliberately, as this Court finds, not filed as such. See Clerk's Office Quality Control Message of April 7, 2008, at 8:44 am ("CLERK'S OFFICE QUALITY CONTROL MESSAGE re 852 Response to (other). ERROR: Document should have been filed as two separate documents. CORRECTION: Attorney advised in future that documents of that nature are to be filed as separate documents. Clerk of Court docketed Motion to Discharge the Jury. This message is for informational purposes only. (plh) (Entered: 04/07/2008)").

The jury resumed its deliberations this morning at 8:00 am, at its request to begin early.

The Court **HEREBY DENIES** "Defendant's Objections to Government's Proposed Jury Instructions Regarding Partial Verdict (Document No. 850) and Cross Motion to Discharge the Jury" (doc. no. 852), for two reasons.

First, the Court finds that the so-called "cross motion" is nothing of the kind. It is, rather, a motion to reconsider the ruling of April 2, 2008, denying his motion for a mistrial, and the failure to docket this motion to reconsider as a motion, and to call it what it is, obviously renders the motion procedurally flawed and the relief requested therein quite moot. While the motion to reconsider was technically filed on April 3, 2008, it was designed, for reasons known only to defense counsel, to ensure that no decision would be reached prior to resumption of jury deliberations this morning.

Second, defendant's motion to reconsider is without merit, *as the Court's supplemental instruction to the jury after being advised by it for the first time that it had reached an "impasse" followed standard operating procedure in the United States District Court for the Western District of Pennsylvania and followed the comments and instruction suggested by the Committee for the United States Court of Appeals for the Third Circuit on Model Criminal Jury Instructions.*

IT IS FURTHER ORDERED that any motion or request for affirmative relief from this Court must be docketed as a motion on the ECF docketing system; failing that, there will be no response ordered and any

> relief requested therein shall be deemed denied.

April 7, 2008 "Order of Court Denying Defendant's Motion for Reconsideration of Denial of Motion for Mistrial Embedded in Document No. 845," (doc. no. 855) (some emphasis added).

5. April 7- 8, 2008

The record shows that the jury thereafter deliberated from 8:00 am until 11:55 pm on April 7, 2008, and again from 8:00 am until approximately 8:30 am on April 8, 2008, when it again advised the Court, by letter presumably signed by the foreman and the secretary, that it was unable to reach a unanimous verdict on any count.

After telephoning counsel and summoning all parties and counsel to the Courtroom at 9:15 am on April 8, 2008 (by ECF text-only notice sent at 8:53 am), this Court discharged the deadlocked jury after first reading the written note, sent through the bailiffs to the Court, stating:

> Pursuant to court instructions the jury contends we have exhausted all further deliberation efforts. We agree unanimously that we are unable to reach a unanimous verdict on all 41 counts and are essentially deadlocked in the case of United States of America vs. Cyril H. Wecht.

See Court Exhibit C-13; Minute Entry for April 8, 2008 (doc. no. 858), and Transcript for April 8, 2008 (doc. no. 874).

A more unambiguous, irrevocably deadlocked jury, and a more compelling demonstration of manifest necessity for a mistrial, is hard to imagine. Nevertheless, despite defendant's expressed concern about "needlessly wast[ing] valuable judicial resources," see Defendant's Objections to Government's Proposed Jury Instructions Regarding Partial Verdict (Document No. 850) and Cross Motion to Discharge the Jury (doc. no. 852), at 6, defendant now proceeds to waste scarce legal and judicial resources on this motion to dismiss the indictment before retrial, based upon the unreasonable assertion that the Double Jeopardy Clause somehow prevents retrial.

Defendant Twice Demanded that the Court Declare a Mistrial and Discharge the Jury Because It Was Hopelessly Deadlocked

The Double Jeopardy Clause protects criminal defendants from later prosecutions for the same offense. See U.S. Const. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."). Under the Double Jeopardy Clause, a defendant has a "valued right to have his trial completed by a particular tribunal. . . . " *Wade v. Hunter*, 336 U.S. 684, 69 S. Ct. 834, 93 L. Ed. 974 (1949). This Double Jeopardy right is held by the individual and is independent of the public interest in conducting "fair trials designed to end in just judgments .... " *Arizona v. Washington*, 434 U.S. 497, 503 n. 11, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978) (internal quotation and citation omitted).

However, the Double Jeopardy Clause does not bar successive prosecutions for the same

offense where a mistrial is required by "manifest necessity." *United States v. Rivera*, 384 F.3d 49, 53 (3d Cir. 1991). Manifest necessity exists where the circumstances leave the trial judge with "no alternative to the declaration of a mistrial," after considering and exhausting all other possibilities. *Love v. Morton*, 112 F.3d 131, 137 (3d Cir. 1997), *citing United States v. McKoy*, 591 F.2d 218, 222 (3d Cir. 1979).

A mistrial "may be granted upon the initiative of either party or upon the court's own initiative." *United States v. Scott*, 437 U.S. 82, 92, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978). Ordinarily, where the defendant seeks a mistrial, "[n]o interest protected by the Double Jeopardy Clause is invaded." Id. at 100. *Oregon v. Kennedy*, 456 U.S. 667, 672, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982) ("in the case of a mistrial declared at the behest of the defendant, . . . the defendant himself has elected to terminate the proceedings against him, and the 'manifest necessity' standard has no place in the application of the Double Jeopardy Clause.") (citations omitted).[3] The Government may bring a subsequent reprosecution in such circumstances without offending the Constitution. *Love*, 112 F.3d at 133. *See also Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003) ("Retrial is . . . permissible where 'a defendant

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[3] There is a very narrow exception to this rule, where the prosecutor's actions giving rise to defendant's motion for mistrial were intentionally done "in order to goad the [defendant] into requesting a mistrial." *Oregon*, 456 U.S. at 673, quoting *United States v. Dinitz*, 424 U.S. 600, 611, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976). This narrow exception is not presented by this hung jury mistrial herein, and defendant cannot and does not suggest that the *Dinitz* exception is applicable.

successfully seeks to avoid his trial prior to its conclusion by a motion for mistrial,' . . . unless the motion is intentionally provoked by the government's actions . . . Ordinarily, '[s]uch a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact.'") (citations omitted); *Arizona v. Washington*, 434 U.S. 497, 509, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978) ("[P]erhaps the clearest example of a situation in which manifest necessity exists for a mistrial is when a jury is unable to reach a verdict."); *United States v. Coleman*, 862 F.2d 455, 460 (3d Cir. 1988) (recognizing manifest necessity for mistrial following a hung jury).

As recently summarized by the United States Court of Appeals for the Third Circuit, albeit in an unpublished opinion, if there is manifest necessity for a mistrial, retrial is permitted without defendant's consent; or, if defendant requests or explicitly or implicitly consents to a mistrial, retrial is generally permitted even in the absence of manifest necessity. *United States v. Allick*, 274 Fed. Appx. 128, 2008 U.S. App. LEXIS 8289, 2008 WL 1745150 (3d Cir. 2008) (because, unlike in this case, the record lacked sufficient information to determine whether the trial judge consulted with counsel and canvassed alternatives to mistrial, as required by Federal Rule of Criminal Procedure 26.3, whether defendant had consented to the mistrial, and whether there was manifest necessity for mistrial, Court of Appeals remands for further development of record and evidentiary hearing). This case obviously presents *both* defendant's consent *and* manifest necessity.

Defendant explicitly moved this Court to declare a mistrial, twice, in unambiguous oral and written motions. Moreover, defendant did not object when this Court read the jury's final written note (C-13), which restated and reinforced what the Court, the parties, counsel, and any reasonable observer were well aware was highly likely, for at least five days – that the jury remained at an impasse, despite two additional days of deliberation, and had not changed its unanimous view that it was hopelessly deadlocked.

With the foregoing background, defendant's claim that he was surprised by this announcement is not credible, nor is his contention that this Court's general instructions to everyone in the courtroom (to remain quietly in their seats and not move about to prevent what had happened when the jury was dismissed the preceding week, for security purposes) somehow precluded counsel from objecting.

First, the record will show that defense counsel have repeatedly ignored and disregarded Orders of Court regarding the placing of objections on the record, among other Orders, and have shown themselves to be anything but bashful. Second, the Court's courtroom decorum procedures upon discharge of the jury, designed to prevent the previous week's chaos and to ensure the security and privacy of the jurors and the safety of all persons in the crowded courtroom, did not prohibit any legal objection by counsel, who had ample opportunity to object.

Third, defense counsel *did* speak at the hearing, *before* the Court formally declared the mistrial and discharged the jury, and did *not* raise

any objection to the pending declaration of mistrial. The transcript of April 8, 2008 (doc. no. 874) reveals the following:

> THE COURT: Does the government have a decision today whether the government will retry the defendant?
>
> MR. STALLINGS: We do, You Honor, and we will.
>
> THE COURT: I would ask that by Friday at noon, that the government file a notice as to which of the counts, which could be as few as one or as many as the 41, which of the counts will be tried in the retrial.
>
> Is the government prepared to proceed immediately to retry the case?
>
> MR. STALLINGS: We are, Your Honor.
>
> THE COURT: Is the defense prepared to immediately retry the case?
>
> MR. McDEVITT: We will have several motions to make before that happens.
>
> THE COURT: Okay. Just for everyone's scheduling purpose, I will set the trial for May 7th – excuse me – May 27th, which is the day after Memorial Day, May 27, 2008, at nine a.m.
>
> That should give defense and the

government sufficient time to file whatever motions they wish to respectively file.

One behalf of the defendant, when would you like to file any motions you wish to file, sir?

MR. McDEVITT: I will need some time to think about that. This is quite a surprise.

THE COURT: Okay. I know everyone needs a little rest, so I appreciate that matter.

I would ask the defense, if you would kindly for me, please file any motions you have by noon on April 18, 2008.

If you find after reflection that date doesn't work for you, then just file an appropriate motion, and I will work with you in that regard.

I will send out a scheduling order as to the May 27th, 2008 date without prejudice to whatever defendant's motions will come before me.

Before I declare a mistrial and discharge the jury, ...

Id. at 3-4.

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I declare a mistrial. I discharge

> the jury and the alternate jury, and, ladies and gentlemen of the jury, if you would come and join me, I would appreciate that very much.

Id. at 8.

Declaration of a mistrial and discharge of the jury is exactly the remedy defendant himself pursued for days before the jury delivered its final "deadlocked" letter to the Court, and the jury's last written note on April 8, 2008, only *bolstered* defendant's stated position that the jury was hopelessly deadlocked and should be discharged without further adieu. ("Pursuant to court instructions the jury contends we have exhausted all further deliberation efforts. We agree unanimously that we are unable to reach a unanimous verdict on all 41 counts and are essentially deadlocked in the case of United States of America vs. Cyril H. Wecht." See Court Exhibit C-13; Minute Entry for April 8, 2008 (doc. no. 858), and Transcript for April 8, 2008 (doc. no. 874).)

Because defendant twice moved for the declaration of mistrial, and explicitly and implicitly consented thereto, Double Jeopardy is not implicated and does not prohibit retrial at the prerogative of the government.

No Reasonable Person Can Dispute That the Jury Was Hopelessly Deadlocked, and That Manifest Necessity Therefore Existed for the Retrial

"A hung jury, the [Supreme] Court has long recognized, meets the 'manifest necessity' criterion, *i.e.*, it justifies a trial court's declaration of a

mistrial and the defendant's subsequent reprosecution.'" *Sattazahn v. Pennsylvania*, 537 U.S. at121, *quoting Arizona v. Washington*, 434 U. S. at 509. *See also United States v. Sanford*, 429 U. S. 14, 97 S. Ct. 20, 50 L. Ed. 2d 17 (1976) (where the District Court properly declared a mistrial *sua sponte* by reason of a hung jury, double jeopardy did not bar retrial); *Crawford v. Fenton*, 646 F.2d 810 (3d Cir. 1981) (on federal habeas petition from state sentence, where District Court found no manifest necessity for state trial court's *sua sponte* declaration of mistrial and discharge of the jury without considering other alternatives, Court of Appeals reversed, holding: "[T]he particular circumstances of this case require, on review, that we grant broad deference to the trial judge's determination. The record not only discloses the exercise of that discretion, but it furnishes ample support for the trial judge's ruling that manifest necessity existed for the declaration of a mistrial. Accordingly, we hold that the trial judge did not abuse his discretion in ordering an end to Crawford's trial. In so doing he did not trench upon Crawford's Fifth Amendment right to be free from double jeopardy."); *United States v. Williams*, 2004 U.S. Dist. LEXIS 11829, 2004 WL 1472793, *1 (E.D.Pa. 2004) ("Regarding Defendant's contention that this Court excused the jury absent manifest necessity, reference to precedent clearly supports this Court's actions after the jury announced its inability to reach a verdict. It has been established for 160 years, since the opinion of Justice Story in *United States v. Perez*, 22 U.S. 579, 9 Wheat. 579, 6 L.Ed. 165 (1824), that a failure of the jury to agree on a verdict was an instance of 'manifest necessity' which permitted a trial judge to terminate the first trial and retry the defendant, because 'the ends of

public justice would otherwise be defeated.' *Id.* at 580.").

On the record before the Court, it cannot be seriously disputed that the jury was hopelessly deadlocked, and that, therefore, manifest necessity required declaration of a mistrial and discharge of the jury.

Defendant's Authority Does Not Support His Position

Defendant relies extensively on *United States v. Rivera,* 384 F.3d 49 (3d Cir. 2004), but it is obvious that Rivera offers no support for defendant's position. In the words of the Honorable Judge Brooks Smith for the United States Court of Appeals for the Third Circuit, *Rivera* "involves the application of the Double Jeopardy Clause where a District Judge has *sua sponte* declared a mistrial *over a defense objection,*" based on the government's inability to produce one of its key witnesses who had injured his leg and was unable to appear in court when scheduled to testify. This *sua sponte* declaration of mistrial over defense objection based on the unavailability of a witness is not even remotely related to the classic manifest necessity situation presented herein, *i.e.,* declaration of a mistrial requested by defendant after consultation with counsel and solicitation of their respective views about alternatives, based upon the jury's persistent and unambiguous statements that it had reached an impasse and was hopelessly deadlocked despite ten days of deliberations and two deadlocked jury instructions.

Rivera stated (in that drastically different context) that "a mistrial must not be declared

without prudent consideration of reasonable alternatives" and that Federal Rule of Criminal Procedure 26.3 requires, among other things, that before ordering a mistrial, "the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives." *Rivera*, 384 F.3d at 56. *Rivera* also stated that "dialogue fostered by Rule 26.3 ensures that only those mistrials that are truly necessary are ultimately granted." *Id.*

There can be *no doubt,* on the record before this Court, that over a five day period, this Court fully and faithfully complied with Fed.R.Crim.P. 26.3 in letter and in spirit, and gave the defendant and the government more than ample opportunity to comment on the propriety of a mistrial declaration, sought their advice as to alternatives, rejected the government's alternative, which was to give the jury a partial verdict instruction, and conducted that dialogue, orally and in writing, and that the mistrial in this case was *absolutely necessary,* as defendant himself argued in requesting a mistrial on April 3, 2008 and again on April 7, 2008. See "Defendant's Objections to Government's Proposed Jury Instructions Regarding Partial Verdict (Document No. 850) and Cross Motion to Discharge the Jury." (doc. no. 852), at 4-5.

Defendant has demonstrated a habit of distorting the record and the law in his motions and briefs in this Court and in the United States Court of Appeals for the Third Circuit.[4] So too as to

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[4] *See, e.g., United States v. Wecht*, 484 F.3d at 214, 219-20 ("Wecht is correct that, in general, *ex parte* proceedings are

this Motion, defendant attempts to distance himself from the position he so vigorously advanced just a few days earlier, before the Court declared the mistrial, but the record prevents him from disavowing his twice stated position to the contrary. Similarly, defendant's assertion that this Court did not conduct the dialogue that Rule 26.3 was designed to foster, and somehow prevented counsel from expressing his position on the matter or from proposing alternatives to the declaration of a mistrial, is a distortion of the actual record.

Moreover, defendant has offered not one citation to any authority that granted Double Jeopardy or other relief based *solely* on a district court's non-compliance with Rule 26.3, because there is none. The closest defendant comes to offering any actual legal authority on this issue is in a footnote wherein he states:

> The Supreme Court added Rule 26.3 in 1993 in response to cases such as *United States v. Dixon*, 913 F.2d 1305 (8th Cir. 1990) (mistrial improper where district judge failed to consult with counsel), and *United States v.*

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disfavored. However, there are a number of circumstances where *ex parte* applications to the court are appropriate, and Wecht appears to overlook our previous statements [in prior published opinions] endorsing the *in camera* inspection of materials that may need to be turned over to the defense;" "Wecht's claim that the Judge has 'threaten[ed] counsel with criminal contempt on five occasions' distorts the record. Wecht Pet. at 47;" "The claim that the District Court Judge accused counsel of 'impugning Judge Cohill' represents a skewed and unfair reading of the record;" "We also do not credit defense counsel's claim that the Judge 'chastised' counsel for filing dispositive motions earlier than required. Wecht Pet. at 48.").

> *Bates*, 917 F.2d 388 (9th Cir. 1990) (same). *See* Advisory Committee Notes to Fed. R. Crim. P. 26.3. The advisory committee propounded the rule, and it described its purpose as providing both sides an opportunity to place on the record their views about the proposed mistrial order. In particular, the court must give each side an opportunity to state whether it objects or consents to the order. *Id.*

Defendant's Brief in Support of Motion to Dismiss the Indictment and to Preclude the Government From Further Prosecution in Violation of the Prohibition Against Double Jeopardy (doc. no. 869), at 9, n.8.

Neither *Dixon* nor *Bates*, non-binding decisions from other Courts of Appeals beyond the Third Circuit, held that the failure of the district court to consult with counsel or otherwise comply with rules of procedure violated Double Jeopardy or required relief, only that, in the absence of a record demonstrating manifest necessity for the mistrial, relief was appropriate under the Double Jeopardy Clause.

But *Arizona v. Washington* explicitly held, contrary to defendant's barren proposition, that where the basis for the trial court's mistrial order was adequately disclosed on the record, the absence of any explicit finding of "manifest necessity" and the failure to explain the mistrial ruling more completely did not render it constitutionally defective as a violation of Double Jeopardy. 434 U. S. at 497. The United States Supreme Court further explained in *Arizona*:

> [T]he mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict [has] long [been] considered the classic basis for a proper mistrial. The argument that a jury's inability to agree establishes reasonable doubt as to the defendant's guilt, and therefore requires acquittal, has been uniformly rejected in this country. Instead, *without exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial.* This rule accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws.

434 U.S. at 509 (footnote omitted; emphasis added).

As the government correctly points out, the only reported decision discussing the effect of a violation of Fed.R.Crim.P. 26.3 wherein the record shows manifest necessity for a mistrial is United *States v. Berroa*, 374 F.3d 1053 (11th Cir. 2004). In *Berroa*, the Court of Appeals for the Eleventh Circuit announced it was deciding an issue of first impression amongst the United States Circuit Courts of Appeals. The *Berroa* case held that the District Court's violation of Fed.R.Crim.P. 26.3, requiring that parties have an opportunity to comment prior to declaring a mistrial, was but one factor to be considered in determining whether the trial judge exercised sound discretion in ordering a mistrial, and that, although the district court erred in failing to consult the parties prior to declaring a

mistrial, its finding of manifest necessity for the declaration of mistrial was supported on the record and was not an abuse of discretion.

Conclusion.

The necessity of denying defendant's motion to dismiss the indictment on Double Jeopardy grounds flows unerringly from his own words: "[T]he defense moves this Court for the discharge of the jury in light of the fact that all jurors confirmed the existence of a hopeless deadlock and that further deliberation would not lead to a unanimous verdict." "Defendant's Objections to Government's Proposed Jury Instructions Regarding Partial Verdict (Document No. 850) and Cross Motion to Discharge the Jury." (doc. no. 852), at 4. Despite defendant's abrupt about-face, the record before the Court establishes that defendant himself insisted that the Court declare a mistrial, twice, that the jury was hopelessly deadlocked, and that manifest necessity dictated that the jury be discharged.

Accordingly, for all of the foregoing reasons, Defendant's Motion to Dismiss the Indictment and to Preclude the Government from Further Prosecution in Violation of the Prohibition Against Double Jeopardy (doc. no. 868) is **THEREFORE DENIED.**[5]

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[5] The Court further finds that, because Defendant's Motion to Dismiss the Indictment and to Preclude the Government from Further Prosecution in Violation of the Prohibition Against Double Jeopardy is frivolous, having no factual support on the record and no legal authority that might plausibly justify dismissal of the indictment on Double Jeopardy grounds, any interlocutory appeal of this Order would not divest this Court of jurisdiction to continue with the pretrial and trial proceedings. *United States v. Leppo*, 634 F.2d 101 (3d Cir. 1980) (per Aldisert, J.; holding that appeal

SO ORDERED this 29th day of April, 2008.

/s/ Arthur J. Schwab
Arthur J. Schwab
United States District Judge

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from denial of defendant's double jeopardy motion to dismiss did not divest District Court of jurisdiction to proceed with trial where district court found the motion to have been frivolous and supported its conclusions by written findings).